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JUDICIAL REFORMS

PROPOSED BY THE

COMMISSION

FOR THE

CODIFICATION OF THE STATUTES.

FIRST REPORT.

PRINTED BY ORDER OF THE LEGISLATURE.

QUEBEC.

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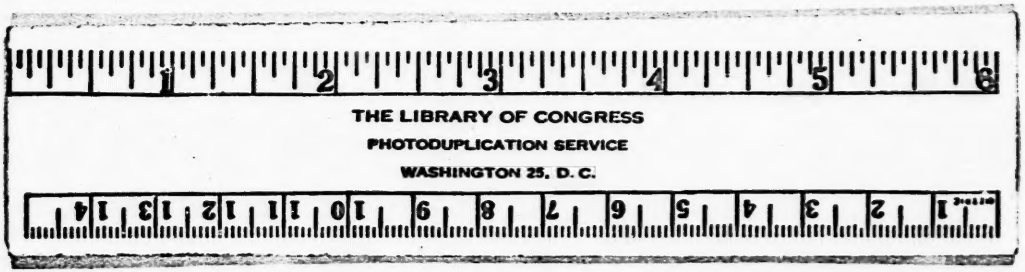
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PREFACE

IN THE FORM OF A REPORT TO THE LEGISLATIVE ASSEMBLY OF THE PROVINCE OF QUEBEC.

May it please your Honorable House:

By a resolution passed at the last session of the legislature, in accordance with the recommendation of the third report of the select committee, appointed to take into consideration the proposed amendments to the Code of Civil Procedure, your Honorable House entrusted the Commission for the Codification of the Statutes, with the preparation of a scheme of judicial reorganization and the remodelling of that Code.

This scheme, which is more a sketch than a matured plan, is now complete; and the Commission has the honor of submitting it to you, leaving it to your wisdom to perfect it.

The Commission might allege, as an excuse for the imperfections of the work, the short time allowed for its preparation; but, being assured of your willingness to credit it with endeavoring worthily to carry out the honorable task which you imposed, it alludes to the haste with which the work required has of necessity been performed, solely for the purpose of ensuring a more careful revision on the part of your Honorable House.

The defects in the administration of justice do not arise from the Bench, which is upright, laborious and enlightened, but from the numerous and radical faults in

the Code of Civil Procedure, the insufficiency of which is universally admitted, and from the imperfect gradation and organization of the Courts. The degrees of justice are too numerous, and its proverbial tardiness in this country must be attributed as much to that fact as to the tendency of our formal and dilatory procedure.

The multiplicity and complication of the forms, the numerous phases of procedure, and the long delays which separate them, are to a great extent the causes of this slowness; but the chief defect in our procedure is the unlimited license given to parties to allow their cases to drag, and to continue them at pleasure.

If to these are added the too infrequent holding of the Courts, the lack of participation in judicial proceedings and supervision over the administration of the Courts * by the ministry, absorbed in political questions, the principal defects of our judicial system would then have been pointed out. These are, however, not the only ones.

In decentralizing the administration of justice by dismembering the old districts and detaching therefrom fourteen new districts, the Act of 1857 carried out a useful reform, and gave to those at a distance from the large centres easy access to the courts established among them.

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* In the draft of the bill accompanying the present scheme of judicial reorganization will be found the duties of the Advocate-General, an office which the Commission proposes to establish, or rather to re-establish, for there existed in Lower Canada before the Union in 1841, an Advocate-General, whose office fell into desuetude under the new system.

The appointment of this officer, to replace, in the administration of justice, the attorney and solicitor-general, the law officers of the crown, whose political duties take up all their time, and to represent the government in all crown cases, and in those between private individuals, in which are raised questions touching the conflicting jurisdiction of the federal parliament and local legislatures, as well as for other judicial matters to be explained during the course of the work, is one of the indispensable conditions of the new organization, and forms an essential part thereof.

But the excessive increase of these courts created too many jurisdictions, and placed the judges exercising their functions therein, in an isolated position which was prejudicial to uniformity in jurisprudence.

This isolation was also prejudicial to the advocates, divided into numerous sections of the bar, strangers to each other, and without professional intercourse or any interest in common. It retarded the rise of the legal profession and deprived the country parts of that social influence which they had a right to expect from it. Thus, by disseminating beyond measure the operations of the judicial power, decentralization diminished its vigor and loosened its ties.

From judicial decentralization so carried out arose the abnormal system of a single judge, condemned, in spite of Bentham's opinion, by the views of nearly all publicists, and disapproved by reason. This system, which our experience soon showed to be insufficient, was replaced by the Court of Review, a hazardous expedient of the Act of 1864 to supplement the omissions of the legislature of 1857, which had neglected to place at the disposal of the districts so parcelled out, a sufficient number of judges to continue, in contested cases, the system of a plurality of judges, which had until then been followed.

Besides adding another to the already too numerous degrees of jurisdiction in our courts, the institution of the Court of Review, a mixed court of first and last resort, which is not appellate and still not a court of original jurisdiction, was a retrograde step in the direction of centralization, and resulted in the revival of an abuse which had disappeared, namely, the domination of the great centres. The aim of the Act of 1857 had been to secure for the country parts their independence of the large towns, and to assure to the new districts their judicial autonomy. These advantages were done away with by the Act of

1864, which submitted the decisions of their judges to review by the courts of Quebec and Montreal, thus placing them in an inferior position with respect to their colleagues of the great centres, and it is these advantages which the Commission wishes to restore to them.*

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* Judicial decentralization is now an accomplished fact, and it would be vain to try to re-establish the old system or to upset the basis of the new.

It must be admitted that, in the beginning, the new system of decentralization was carried too far, and a number of separate jurisdictions, disproportionate to the wants of the public, were created, a defect which the improved means of communication render every day more apparent. It is, however, with a view to the future, as well as the present needs of a people, that laws are framed and institutions created; and who knows but that in a century, or even less, our descendants, on account of the increase in population and multiplicity of social ties, may not find these jurisdictions too large which we now find too small?

The Commission had, however, no choice, being persuaded that any scheme of judicial reorganization based upon the principle of *recentralization* (if such a term may be used) would inevitably mis-carry in a House, seven-eighths of whose members represent rural constituencies, and it had, therefore, to base the proposed reforms upon the present irrevocably fixed order of things, and endeavor to improve, instead of to destroy it.

The best way of attaining this result was to relieve the new districts from all dependence upon the great centres, by suppressing the Court of Review, which is held by three judges of the districts of Quebec and Montreal, and to have the cases of the territorial divisions, dismembered from the old districts, decided in the first instance by the judges of the fifteen remaining districts (the districts of Gaspé, Saguenay and Chicoutimi, from their geographical position and peculiar circumstances, being excluded) grouped into (*arrondissements*)* circuits of three districts each, whose judges, whilst continuing to reside in their several districts to administer local affairs, shall meet to decide together the cases in such circuit now submitted to the Court of Review.

In these circuits, no one district shall have any preference over the others, as the three judges will sit alternately and in rotation in each, to adjudicate upon the cases of the district. It will no longer be necessary for the parties to leave home in search of justice in the large cities, as they were compelled to do under the old system of centralization, and as they now are for cases in review, but they will find it at hand as they do now in the courts of original jurisdiction; the only difference being that, instead of receiving it at the hands of one judge, there will be three; and these three judges will not, as now, be strangers, but be their own natural judges. The superiority of this system, which abolishes one degree of jurisdiction and attains the same end, a decision by three judges, over the present one, which constitutes a second court within the court itself, and necessitates two trials instead of one, is apparent, not only for the rural districts,

Owing to the number of judges appointed for the Courts of original jurisdiction, seven in Montreal, four in Quebec, and with two exceptions, one for every rural district, it would not be difficult to carry out the proposal to suppress the Court of Review, to have three judges to decide in the Court of original jurisdiction, in all the districts of the province,* the merits of contested cases before the Superior Court, and to continue the competence of one judge for all other matters. The boundaries of all the districts, including those of Quebec and Montreal, and the powers and residence of the judges in each district continuing the same, the only change would be the division of the territory forming the new districts, into† circuits (*arrondissements*), each comprising three adjacent districts. The judges of each circuit, continuing, as in the past, to discharge their functions in their own districts, should sit together during a certain number of terms during the year, in each of the three districts in

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but also for those of the cities, which, with the exception of other residents not being obliged to leave the district, suffer the same inconveniences as the others; and further, are often deprived of the services of their judges engaged in deciding outside litigation.

If in 1873, when the appointment of one judge was made for each rural district, which up to that time had one judge for every two districts, this system, which is at once simple, efficient and practical from every point of view, had been inaugurated, how many complaints, recriminations and vain attempts at reform would have been obviated.

The idea of retaining the system of a plurality of judges is not altogether a new one. The question was raised in the House in 1857, when the system of decentralization was being discussed. If the Orders of the day for that session are consulted, a notice of motion will be found, to which the author of this report, who was then a member of the legislature, was not a stranger, to continue the old system of a plurality of judges in contested cases. But the Government of the day, not being then in a position to appoint a sufficient number of judges, opposed the motion, and, as it could not be carried against the ministry, it was dropped.

* Gaspé, Saguenay, and Chicoutimi excepted.

† The word "circuit" given as the translation of the word *arrondissement*, means a union of several judicial districts, and its acceptation is quite different from that which it has when applied to the Circuit Court.

rotation, to hear and determine the contested cases of the district, and alone, in each of these districts, to hear other matters. The judges of Quebec and Montreal shall continue the exclusive exercise of their functions in each of these cities, and the only change, with respect to them, would be to cause the court to be composed of three of them for the former cases, and one alone for the others. This division of jurisdiction would require the Court in all the districts to sit in two divisions, the first of which, composed of three judges, to be called the first division, and the second, presided over by one judge, to be called the second division.

Under the new organization, the districts of Quebec and Montreal will retain their autonomy and the integrality of their jurisdiction, without pre-eminence over the other districts, which, with regard to the old districts, would be placed on a footing of equality.

All the districts, both old and new, would have the benefit of a plurality of judges; the latter, without being obliged to have recourse to outside courts, and the whole without being compelled to submit to a second trial before the Court of Review, which would then be superfluous.

With respect to the rural districts, on the day upon which this Court shall disappear, and upon that day alone, judicial decentralization will be fully completed.

The Court of Review, moreover, has been no less prejudicial to the districts in which it sits, than to the other districts. If it does not compel the parties to suits before it to inconvenient and expensive journeys, it none the less subjects them to the costs of a useless trial, and delays their suits, in the first Court, by overburdening their judges with work, which is prejudicial to the dispatch of ordinary business.

The superiority of the proposed system over the present

one, both as regards the celerity of the procedure, and the efficiency of the judgments, will be shown when we treat in detail of the organization of the two divisions, in all the districts, and the division of the new districts into circuits.

This system, which in the rural districts will require the co-operation of three judges in each circuit, and place their members of the bar in constant communication, will, in addition, have the advantage of remedying the defects, above noted, that have arisen out of their isolation, with respect to the uniformity of jurisprudence, the dignity of the bench and the elevation of the moral status of the legal profession.

As it further necessitates the permanent sitting of one division of the Superior Court, and in the district of Montreal, of both divisions, the duties of the Court will require the whole time of the judges, who should be exempt from holding the Circuit Court, or the County Court, which is to replace that tribunal.

This Court will be held by county judges, whose appointment the Commission suggests as indispensable to the working of the new organization. In its proper place, will be seen the plan for the organization of this Court, whose judges should also act as district magistrates in the circuits, (*arrondissements*) fulfil the duties of the second division, in the absence of the superior judges engaged in holding the first division, and preside, when necessary, when evidence is being taken.

As already noticed, the institution of the office of advocate-general, to represent the government and supervise the administration of justice, an office which existed before the Union of 1841, but which has, for a long time, fallen into disuse, is a necessity that is now felt.

The judicial province, divided for the hearing of cases in appeal, into two divisions, based upon its original division

into two districts, the district of Quebec and the district of Montreal, has only one chief justice for the Court of Appeals, and it is so also for the Superior Court. This fact is of no consequence for the former of these Courts, but not so for the latter, for the jurisdiction of the chief justice of the province, especially for certain purposes, which will be enumerated, extending over the whole province, is a source of trouble for the district in which he does not reside, and imposes upon him an excessive amount of supervision.

Some other changes proposed by the scheme of re-organization, which require the initiative of the judges, such as the choice of assistant judges (*juges-suppléants*) to be taken from among the members of the bar,* a revival of the old provisions of the Judicature Act of 1843, the fixing of the terms of the first division, in the districts of Quebec and Montreal and in the circuits, are the principal purposes which require, as at present for the hearing of cases in appeal, the division of the province into two grand divisions or jurisdictions, and the conferring upon a particular judge the title of chief justice for the division in which the chief justice of the province does not reside, with powers similar to those conferred upon or which may be conferred upon that officer, and which he will continue to exercise in the jurisdiction in which he resides, while retaining his original rank and title.

This new division of the province into two jurisdictions for these additional purposes, and the appointment of a second chief justice, who will, at Montreal, fulfil the duties now exercised by the chief justice of the province, and

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* The reader, on referring to the Act for the creation of the office of Advocate-General, upon whose initiative assistant judges are to be chosen from the members of the bar, and who participates in their appointment, will be in a position to appreciate the usefulness of this innovation.

which the latter will continue to exercise at Quebec, are two other reforms suggested by the Commission.*

The cognizance of certain civil matters assigned, although exceptionally, to mixed tribunals, held by justices of the

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* Some persons may perhaps find the appointment of two chief justices for the same court somewhat anomalous. But this is more apparent than real. It is not, properly speaking, the appointment of two chief justices that is required, but the appointment of one chief justice for a particular part of the province, whilst retaining the office of chief justice of the whole province or of the whole court.

This was done for a long time. Under the system prior to the formation of the Superior Court, there was always a chief justice for the district of Quebec, and another for the district of Montreal. That for Quebec had the title of chief justice of the province, and that for Montreal, chief justice of Montreal. There was, however, as at present, for the Superior Court, only one court for the country, the Court of King's Bench, divided into sections or districts.

The terms of the ordinance of 1785, called by old practitioners the "25th George III," and those of some subsequent Acts in stating "there shall be a Court of King's Bench for the district of Quebec, and a Court of King's Bench for that of Montreal," each of these courts having special judges who had no jurisdiction in the other, seem to be contrary to the idea of the unity of the court. But if the substance, and not the letter of these provisions be considered, it will be seen that there was really only one court, that of the Court of King's Bench, composed of several tribunals sitting in different places, as, apart from their territorial jurisdiction, the competence in civil and criminal matters of both these courts was the same throughout the province. Was not the Court of King's Bench, established at Three Rivers, and later at Sherbrooke, held by the judges of Quebec and Montreal, in addition to the resident judge and the provincial judge?

Even if this interpretation were erroneous, is it not within the power of the legislature to enact that the Superior Court shall have two chief justices, one of whom would be called, the chief justice of the province, and the other the chief justice of some particular district in the province, and whilst preserving to the former his title, honors and prerogatives, confer some of his functions upon the chief justice of Montreal, within the extent of territory now within the jurisdiction of the Court of Appeal sitting in the latter city, which is in fine the object of the proposed amendment?

Call the chief justice of the province the first president, or simply the president of the Superior Court, and the chief justice of Montreal the second president or vice-president, and all misunderstanding would cease.

Another bill annexed to this report enters into further details upon the subject of the division of the province into two grand jurisdictions or divisions; the name is of no moment. The bill for the creation of the office of Advocate-General, who is to be mover in the proceedings necessary to attain the purposes of this division, completes these details.

peace, and the jurisdiction given to the ordinary judges over matters connected with administrative and municipal law, such as the revision of electoral lists, the contestation of elections of members of the provincial legislature, and appeals created by the municipal code, are abuses that are prejudicial to the unity of the judicial authority, impose duties upon the courts that are foreign to them, and at the same time compromise their independence. These have not escaped the reforms proposed by the Commission.

Another subject of reform will be the reorganization of the office of bailiff, which holds, in our judicial system, a rank which is not without its importance, and which owes less to the nature of its functions than to the abuses that have disgraced their exercise, the existing prejudices against it.

In view of the eventual incorporation of this body, an incorporation rendered necessary to raise it to a level with the duties to be imposed upon it by the new code, an act to consolidate the legislative provisions governing it, will be submitted to your Honorable House.

The laws of organization and the procedure before the Court of Appeals also require amendment. These have not been overlooked, and a chapter upon this subject will be found herein. The concurrence of the statutory appeal to the Privy Council and that to the Supreme Court, is an anomaly which should no longer be tolerated, and the former should be abolished, as the latter is beyond our jurisdiction.

Trial by jury we should also abolish in all civil matters, while retaining it in commercial cases.

To remedy the abuses noted in the foregoing pages, and to carry out the reforms proposed, your Commission has prepared the scheme of judicial reorganization and con-

solidation of the Code of Procedure, the first whereof accompanies this report, and the action of your Honorable House upon it will decide the completion of the latter.

The whole nevertheless humbly submitted.

T. J. J. LORANGER,
Commissioner.

C. A. PARISEAULT,
F. H. OLIVER,
Secretaries.

Quebec, 8th March, 1882.

JUDICIAL REFORMS

PROPOSED BY THE

COMMISSION

FOR

THE CODIFICATION OF THE STATUTES.

FIRST PART.

JUDICIAL REORGANIZATION(*)

FIRST CHAPTER.—SUPERIOR COURT.

ARTICLE FIRST.

The Circuit Court is abolished, and, in its stead, a County Court is created, with jurisdiction over the whole Province, and competence in all actions in which

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* In all judicial systems, the organization of the courts and the procedure therein are the subject of separate laws. There however exists so close a connection between these laws, that it is impossible formally to separate in theory, two subjects so intimately connected in practice. Thus the judicature acts always and inevitably contain provisions concerning procedure and *vice versa*. The Commission could not altogether free itself from the exigencies of this close connection.

To logically divide its work and follow the order in which the House required it, the Commission first prepared a separate scheme for the reorganization of the courts, in which are to be found numerous provisions touching procedure, and which, strictly speaking, should have been excluded, but which were necessary to complete the system as a whole, and to illustrate its effects and reveal its character. In the final draft of the law respecting judicial reorganization and

a sum of money or anything of a pecuniary value not exceeding one hundred dollars, is claimed.† The procedure before this Court is summary.

The want of a Court for the summary decision of small causes, with jurisdiction over the whole province, has long been felt. The Commissioners' Court, an exceptional tribunal, left intact by the present scheme, with local jurisdiction limited to certain territories, and special competence only over actions of debt up to the sum of $25, does not satisfy this want. It is, in addition, presided over by men who are unacquainted with the law, and it is not the court of summary jurisdiction required by the country.

The Circuit Court, partly of original and partly of ultimate jurisdiction, a fading memory of a now forgotten epoch in

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the Code of Procedure, some of these provisions will remain in the former and others take their proper place in the latter.

The scheme of reorganization is far from being a finished work. It is simply an outline, to be hereafter filled in and arranged, and whose lines themselves will be altered.

For greater precision, a number of suggestions have been made in the shape of articles, whose wording and order will be hereafter modified.

† Under the new system there will be a County judge for each district in the province, and as many County Courts as there are now, or might be, Circuit Courts.

There shall not be concurrent jurisdiction among the various County Courts. Each County Court shall have exclusive jurisdiction within the territorial limits of the County, and the rule now in force, which gives to the Circuit Court at the *chef-lieu* of the district, jurisdiction over cases in all the counties of which it is composed, shall be repealed. By the reduction of the jurisdiction of the County Court from $200 to $100, this Court will, in those counties which are not the *chef-lieux* of districts, lose those cases that are between $200 and $100, but on the other hand will gain by those cases under $100 which now go to the *chef-lieu* of the district. As to the *chef-lieux*, the decrease in the business of the court, occasioned by the loss of cases under $100 coming from the other counties, will be counterbalanced by the increase in the cases from $100 to $200 coming from the counties, which will be taken before the Superior Court.

our judicial system* is presided over, to the detriment of more important Courts, by the superior judges, which it takes away from their ordinary duties. The holding of this Court by these judges is, moreover, incompatible with the system proposed by the Commission, which requires the constant employment of their time for the business of their Court, and their continued presence at the *chef-lieu*.

Its competence, which includes suits for a sum of $200, exceeds also the powers of an inferior Court, and to obviate this anomaly, an appeal is allowed in cases from $100 to $200, an abuse which the lowering of the competence of the County Court, limited to suits for sums up to $100, will cause to disappear. The competence of this Court we have fixed at $100, for we think that the decrease in the value of money has to-day reduced that of $100 to at least ten pounds sterling, which was the figure of the competence of the *inferior term* of the King's Bench, established by the Legislative Council in 1785. Twenty pounds currency was the limit of the competence of the inferior term of the Queen's Bench and of the Circuit Courts established by the Judicature Act of 1843. These courts were courts of ultimate jurisdiction, as will be the County Court, in which the proceedings will be summary. Simplicity in the

* It must be remembered that the Circuit Court, borrowed from the English judicial system, was created before judicial decentralization, at a time when the judges and advocates from the cities went to the country to administer what might be called ambulatory justice.

The term "Circuit Court," therefore, does not now apply, and the term "County Court" would be much more suitable for that Court, whose jurisdiction extends over the county, as the term "District Court," which was for some time the name of the courts of first instance in France then divided into districts, would be more suitable than the term "Superior Court" for our tribunals of original jurisdiction, whose territorial authority is limited by districts. A proposition in this sense will be made hereafter. It is worthy of note that the name of District Court was formerly given to our courts, and that it was only suppressed by the Judicature Act of 1843.

forms, and promptness in the despatch of business, are conditions essential to the usefulness of such a court.

The county judge, who should be an advocate and, in addition to being otherwise qualified, should have five years practice at the bar or on the bench (the one being a complement of the other,) shall perform all the duties required in non-contentious proceedings, and shall, in contentious proceedings, replace the judge of the Superior Court, in case of absence or inability, in all matters in the second division, whose powers, as will be seen, are limited to default cases and incidents of procedure.

The want of a summary jurisdiction has long been felt in both criminal and civil proceedings. This want gave rise to the district magistrates' court, in great part abolished after a few years existence, and which, by conferring on the county judge the powers of the district magistrate, the Commission proposes to re-establish.

The competence of the County Court, therefore, would be that of the present Circuit Court, in cases of $100, with scarcely more than one modification, the abolition of the right of evocation to the Superior Court in matters affecting real and future rights.

There are too many degrees of jurisdiction in our judicial organization.

To state that an action for a fee of office, say that of a clerk claiming five shillings for the cost of a writ, if his right thereto is contested, or a real action, in which there is question of a pecuniary interest of twenty dollars, if the title is disputed, may run through four degrees of jurisdiction in the province, not counting the appeal to the Privy Council, and that to these five degrees, the Supreme Court adds a sixth, if an appeal is taken from the judgment of the Court of Appeals, respecting a municipal by-law, however small the pecuniary or other interest of the parties in the

question raised by such contestation, is to shew how defective is our judicial system in this respect. What a large field does it not open to the obstinacy of litigants, and what a small guarantee does it afford of the stability of the law?

In the greater part of Europe, justice is rendered in two degrees. It is so in France, for the *Cour de Cassation* is not, properly speaking, a Court of Appeals, and, as a rule, it is the same in England. Two degrees exhaust the jurisdiction of the other provinces of the Confederation. In the legal world, there is scarcely any place, except the Province of Quebec, in which the privilege of so many recourses exists, and which enjoys the luxury of four degrees of jurisdiction; six degrees, if to those given by itself, are added the two that have been imposed upon it.

One of these four degrees now consists in the evocation from the Circuit Court to the Superior Court, of cases, no matter how small the amount, arising out of fees of office, or revenues due to the Crown, or which affect the future rights of the parties, or titles to real estate.

This right of evocation, should doubtless be suppressed. In fine, in what does a fee of office, annual rent, future right, or right of property differ from any other claim, when the value of the property, the principal of the rent, or the capitalized amount of the fee claimed, do not amount to the jurisdiction of the superior tribunal, and why, in such a case, should not the inferior Court be vested with ultimate jurisdiction, as in other actions of debt? What is the criterion of interest in all these cases, if it be not one of money, and why should the Court, which ultimately decides pecuniary interests in the other cases, not decide equally in these? The time has long passed in which certain Courts had privileged jurisdiction over special matters, outside of their pecuniary interest.

It is, therefore, undeniable that the Court which has the power to finally decide the case of a party claiming the amount of a promissory note for fifty dollars, should have the same power, when there is in question an immoveable property of the same value, a fee of office, or a rent, whose capitalized value or principal is worth only that sum.

Let us proceed and see whether the same decision should not hold good when the Court is seized of an action for a fee of office, or arrears of rent, the amount of which is within its jurisdiction, but the capitalized amount or principal of which exceeds it, and whether it should remain seized of such a case without evocation?

This second question is of more difficult solution.

Two reasons are generally given in favor of evocation. The first is, that when an action for arrears of rent, below the jurisdiction of the Superior Court, but whose principal is within that jurisdiction, is brought before the Circuit Court, and the defendant, in his defence, alleges the non-existence or the nullity of the deed constituting the rent, owing to the want of jurisdiction in the Court over the principal, the parties must be sent before judges who are competent to decide the question.

The second is, that if a defendant were allowed to plead and have the question of the principal decided before the first Court, this judgment of a tribunal, incompetent *ratione materiæ*, would none the less have the authority of *res judicata*, for the arrears as well as the principal itself, and that the effect of a judgment in an action for past would affect future arrears, even in cases in which there was no question of the principal.

To the first reason, the answer is, that the defendant, summoned before a court of limited jurisdiction, may plead in his defence, matters over which the Court would have no jurisdiction, if they had been invoked in the action, and to

the second, that a judgment for arrears has not the effect of *res judicata*, with respect to the principal or subsequent arrears.*

But, supposing the first or second of these answers to be doubtful, or that both were so, it would be easy to introduce a special provision to remove the doubt, and enact that the inferior tribunal should have jurisdiction in these cases, without giving rise to *res judicata*, as respects future cases. This would be all the more reasonable, as the procedure before the County Court being summary, and the contestation verbal, the authority of *res judicata* would have effect only when the same identical thing would be twice claimed,† which is not the case in question.

There remains one other cause for evocation from the Circuit Court to the Superior Court, that of actions brought by the Crown to recover its revenue. This case may be assimilated to the others without infringing either the rights of the Crown or public law, for, although a law of public order, allowing the Sovereign the choice of tribunals, whatever may be the amount of the claim, is often invoked, there is no provision, either of public or common law, which derogates from the ordinary rules of the competence of the court in these cases.

We may then lay down, as a first reform on this point, the rule that no case brought before the County Court can be

* Merlin, Rep., Vo. chose jugée XI., 17 *vide* page 688.
Laurent 20, No. 36, 61.
Pothier, Obligations Nos. 889, et *seq.* Chose jugée.

† The authority of *res judicata* is either expressed or implied. I sue you a second time for something for which I have already sued you, and upon which judgment intervened. That is *res judicata* expressed.

I sue you for one year's arrears of rent for which I had already sued you in another year. If I have won or lost my case on the same grounds which you invoke again in the second suit, the first judgment may create the authority of *res judicata*, but implicitly. It therefore requires that the defence should show the identity of these reasons, which it could not do if such defence were verbal.

evoked to a superior tribunal, with one exception, however, that in which there is raised a question of the constitutionality of a federal or provincial statute.

In this case, the right of evocation to the Superior Court may be exercised, not *de plano*, as it now is, but in the discretion of the superior tribunal, which, according to the circumstances, may grant or refuse the evocation, without its judgment, in this respect, being subject to reform.

ARTICLE 2.

The jurisdiction of the Superior Court shall commence with cases of a pecuniary value exceeding $100* with ultimate jurisdiction up to $500, and subject to appeal beyond that sum to the Court of Queen's Bench, which, for the future, shall be known in civil matters simply under the name of "Court of Appeals."†

By the proposed reduction in the competence of the County Court to $100, the cases of $100 to $200 will fall within the jurisdiction of the Superior Court. But as these cases, unless otherwise provided, are as other matters before the latter Court, within the jurisdiction of the Court of Appeals, it is necessary to show that cases of such small

* The competence of the Circuit Court was already reduced in 1870 from $200 to $100 in the districts of Quebec and Montreal, under the present law which requires that Court to be held by a Superior Court judge. This reduction should therefore with greater reason be made under a system which confers this jurisdiction upon an inferior judge.

† The Court of Appeals is now called "The Court of Queen's Bench—Appeal side." Should not this clumsy name give place to the more simple and correct name of "Court of Appeals," which is the name under which Courts of Appeal are everywhere known, and which was that of the first court of sovereign jurisdiction established in this province in 1784?

interest, and even those of $200 to $500, should be decided in one degree.

The determining cause for allowing an appeal is not the particular effect of the first judgment upon the fortune of the parties, for an unjust condemnation for $20 might have a disastrous effect upon the poor, whilst a similar condemnation for $500 would only slightly or not at all, affect the rich. In such a case, the consequences of a bad judgment would be more prejudicial to the former than to the latter of these litigants, and, in taking as a rule for allowing an appeal, the eventual consequences of the judgment upon the fortune of the parties, we should, in case of doubt, allow it from all judgments. The criterion of the appeal is the relation of the amount in dispute to the costs. The legislature should not, by allowing frivolous appeals, expose parties to costs disproportioned to the matter in litigation and which might equal or even exceed it in amount.

The Commission is of opinion that the restriction of the right of appeal to actions exceeding $500 would answer the requirements of this rule. The appeal in personal actions of $500 and under would therefore be taken away. We will enter into more ample details upon the improvements to be made in appeal, when we treat of the reform of the Court of Appeals.

From the suppression of the Court of Review, it follows that appeals will be taken directly from the court of original jurisdiction to the Court of Appeals in the province, in which justice will henceforward be rendered in two degrees.

ARTICLE 8.

The Statutory Appeal to Her Majesty's Privy Council is also abolished.

There remains the appeal to the Privy Council which, since its institution, the country has always wished to see abolished, but which a prejudice has caused to be considered as beyond the power of the legislature. There is both truth and falsehood in this idea of the incompetence of Colonial legislatures over appeals to the Privy Council of the Sovereign.

It is true that our legislature has not the power to abolish the right of appeal to the Sovereign, considered as an attribute of the prerogative of bringing before him all judgments of the empire, and of judging them without further appeal; in the same manner as it is not competent to withdraw the right of every subject, who deems himself aggrieved, of placing his grievances before the Throne and asking for redress. This common law appeal, which is exercised only on application to the Privy Council and after due inquiry, and does not stay the execution of judgment until after it is allowed, is altogether different from the statutory appeal created by the legislature itself, which is exercised *de plano*, and which suspends the judgment of the Court of Appeals from the day the security is put in. It is this statutory appeal, created by it, which our legislature has a right to suppress, and which the Commission recommends should be abolished.

The appeal to the Supreme Court, which is beyond the action of our provincial legislature, is different, and it constitutes a third degree of jurisdiction which we have no right to touch.

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The anomaly of an appeal taken beyond the seas, before judges who are strangers to the country and are ignorant of its laws, already sufficiently patent in itself, is rendered more so by the concurrence of this appeal with that to the Supreme Court, exercised, under existing laws, simultaneously or successively in the same case. Let us suppose two parties equally dissatisfied with a judgment, having a right of appeal, at their option, either to the Privy Council or to the Supreme Court, and that one chooses the former and the other the latter. In the same case they, at the same time, plead before two courts, neither of which is subordinate in jurisdiction to the other* and whose judgments will be of the same force and equally executory. Shall both these courts decide the question or shall the first seized of it alone decide it? In the first hypothesis, which of the two judgments would be final, if they are contradictory? In the second, would the party, condemned by the court first seized of the appeal, lose his recourse before the other court, if still in time to exercise it? It is certain, that in the

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*Notwithstanding the theoretical pre-eminence of the judgments of the Privy Council over those of colonial courts, even over those of the Supreme Court of Canada, this sovereign authority is applicable only to judgments which are directly referred to it. Thus the Supreme Court is subordinate to the Privy Council, which in virtue of the royal prerogative, and notwithstanding the provision to the contrary in the Act creating that tribunal, has a right to revise its judgments. Here the sovereign power is exercised in the natural course of its jurisdiction and in its hierarchical conditions. The competence of the superior is exercised over the inferior tribunal by the subordination of the latter to the former. There is an appeal from the one to the other.

It is not so in the case in which an appeal is concurrently taken from the Court of Appeals to the Privy Council and the Supreme Court. There is not in this case an appeal from one to the other of these courts, they are not placed in any relation, and there can be no question of the superiority of one over the other. The appeal having been brought to both courts from a judgment to which both are equally strangers, they are for the purposes of this double appeal and with respect to the judgment, considered as two tribunals with equal power.

This is the reason for the statement in the text that neither is subordinate in jurisdiction to the other.

former case, the second judgment would be equal in value to the first, that is to say, that they would paralyse each other, and both remain without effect, and that, in the second, there would be a second right of appeal. One of these two appeals, therefore, must be abolished, retaining that which we cannot suppress and abolishing the other, that is to say, the appeal to the Privy Council.

ARTICLE 4.

The power of the Court of Appeals to take cognizance, incidentally, of interlocutory judgments rendered in the court of original jurisdiction, is also abolished. In future, this appeal shall not be taken, except at the same time as the appeal from the final judgment.

While the Commission is proposing the suppression of useless appeals which delay, beyond measure, the decision of cases and embarass the administration of justice, there is one that should not escape censure. That is, the appeal from interlocutory judgments, creating what is called a "definitive prejudice," and given, by article 1116 of the Code of Civil Procedure, which reads as follows:

"An appeal also lies from interlocutory judgments in the following cases:

1. When they in part decide the issues;
2. When they order the doing of anything which cannot be remedied by the final judgment;
3. When they unnecessarily delay the trial of the suit.

It suffices to glance at the effects produced by this appeal upon the progress of a case, to consider the delays that it causes to the trial, and its slight utility compared to

the grievances it gives rise to, to be convinced of the necessity of abolishing it.

In examining this question, it must be remembered that the appeal from the final judgment affects all the interlocutory judgments, and includes those now being considered; this shews that the suppression of the appeal from interlocutory judgments would not leave the party who has been aggrieved, without recourse.

The first of the cases giving rise to an appeal, according to article 1116, is the decision, in part, of the issues.

The most frequent cases of appeal, under this article, are from judgments upon demurrers. Now, as the present plan of reform suppresses the hearing on demurrers, which it replaces by the hearing on objections to the articulation of facts, as will be seen later on, this part of the article, if preserved, would remain without application.

The second is the case in which the interlocutory judgment orders the doing of anything which cannot be remedied by the final judgment, such as an improbation, proofs and reference to experts..... These are the most striking examples ordinarily cited, and, in extending the rule, it is commonly said, that the final judgment cannot remedy the injury caused to the party by the improbation improperly granted, the adduction of evidence allowed contrary to the ordinances and to articles 1233 and 1235 of the Civil Code, a reference to experts that is not pertinent, a rendering of accounts improperly ordered.....

This reasoning is sanctioned by the bar, and routine has so accustomed it to be considered as a legal aphorism, that the Commission is reluctant to contradict it. There is, however, nothing which is less founded than this argument. Cannot this judgment entirely overlook the report of the experts or the account so rendered.....set aside the evidence obtained in this irregular manner, and dismiss the

pretensions of the party who had no other means of sustaining them.

What, in such a case, will the party, who has obtained permission to take these irregular proceedings, do, when he sees himself deprived of all advantage from them? He will then do as he would to-day, if this proceeding had been refused by the interlocutory judgment, confirmed by the final judgment (for article 1116 gives no appeal when the thing asked for, and which the final judgment cannot remedy, has been refused); he will appeal from this final judgment, in the same manner as a party against whom evidence, which he considers illegal, has been allowed, and the Court of Appeals will order such evidence that has been rejected, to be taken, or confirm the judgment rejecting it.

The same would apply to improbation, reference to experts, and other similar cases.

To this the objection may be taken that it exposes the party to costs for evidence and proceedings, which would be altogether lost, if such evidence or proceedings are set aside.

This may be a serious inconvenience, but if it is compared with the incidental proceedings in appeal, which may last for years, during which the main case is suspended, especially when we consider that this appeal is not exercised *de plano*, but must be obtained, with full cognizance of the matter, by means of a technical and complicated procedure, it will be found that, as respects costs and delay, the greatest inconvenience arises from the present system.

In face of such a result, it would be difficult to favorably view the fourth category of article 1116, allowing an appeal from a judgment which unnecessarily delays the trial of the suit.

A singular manner of avoiding the delays of a suit, to hasten it by another! Is it not, in all respects, a remedy worse than the disease?

In place of taking to the Court of Appeals an interlocutory judgment rendered by the second division, held by one judge, the Commission proposes to substitute, in the cases in which such appeal is now allowed, a revision before the first division, which is presided over by three judges.*

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* There are, however, judgments which are interlocutory in form, as they do not finally decide all the points in a case and do not terminate it, which none the less decide the merits; as when an action of separation from bed and board, or of separation as to property, a petitory action being maintained, the judgment orders, in the first case, the liquidation of the matrimonial rights of the consorts, and in the second of the fruits and revenues.

It is evident, that in these two cases and in other similar cases, the judgment is, in the main, final; that the whole depends upon the execution of the interlocutory judgment, and that no subsequent judgment can remedy the injury suffered by the defendant, if such judgment is erroneous.

In the same way, certain interlocutory judgments which precede the final judgment, have a definitive character, by their effect upon the incident disposed of by them, such as provisional measures, capias, simple attachment or conservatory seizures. In both these cases, the injury caused by a judgment, which, in rejecting a demand to set aside the provisional measure, would have the effect of depriving the defendant of his liberty or of the enjoyment of his property, during the progress of the suit, or which, in maintaining the petition to set aside such conservatory proceedings, would deprive the creditor of his recourse against the person or property of his debtor, who may fly the country or dissipate such property, cannot be remedied by the final judgment.

It would be proper to treat the judgment, in both these cases, as definitive or final, and to allow an appeal, if the case is susceptible thereof.

This appeal, however, should not stay the proceedings in the main action, with which the incident is not necessarily bound up.

In fact, the appeal and the case might go on concurrently. In case the appeal is decided before the principal case, and if the provisional measure, such as the capias, simple attachment or conservatory seizure, is maintained, proceedings continue as if no appeal had taken place; in case the provisional measure is rejected, the case goes on as if the creditor never had recourse thereto. If the principal demand is decided before the appeal, and if the judgment maintains the action, the execution of the judgment is suspended until such appeal is decided. If the action is dismissed, this dismissal would have the effect of reversing or

ARTICLE 5.

The Court of Review is suppressed.

To thoroughly understand the reasons for the suppression of the Court of Review, apart from those already given, it is necessary to refer to the origin of this court and the causes which led to its institution.

Until the Judicature Act of 1857, which decentralized justice and created new districts, the Superior Court, and before it the Court of Queen's Bench, sitting as a court of original jurisdiction, had always been presided over by three or four judges, four in Quebec and Montreal, and three in Three Rivers and St. Francis.

The division of Lower Canada into twenty districts, made the former system of holding the courts with several judges impossible, and forcibly imposed the injudicious system of a single judge, condemned by the majority of authors and by our experience in this country.

A modern writer * says: *Il est dangereux de mettre entre les mains d'un seul juge, la vie et la fortune des citoyens.* And an old saying of the French courts was: *Fol est le juge qui seul juge.*

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confirming the judgment upon the incident, although not entering into the merits of the appeal, which would become useless, and as such, would be disallowed but with costs, against the creditor.

It will be further seen in these latter cases, that, to the impossibility of repairing the injury caused by the first judgment, without a right of appeal, there is added another circumstance which distinguishes them, from ordinary judgments on incidental proceedings, that is, that the appeal does not necessarily suspend the trial, and this suspension is left to the decision of the first division and is discretionary with that court.

We will defer the further consideration of the rules arising from these distinctions, until we treat of the power of revision over interlocutory judgments of the second division, in the title of judgments.

* M. Bergson, Origines du Droit Civil moderne de l'Europe, p. 147.

It is true that as an objection to a plurality of judges, the example of England is given, where one judge presides at the trial. But it must not be forgotten that this trial is a trial by jury, in which the jurors are judges of the fact, that the functions of the judge are confined to laying down the law, and especially that the judgment on the verdict and upon the questions of law that have been raised, is rendered by three and four judges composing each of the higher courts of the country. It is the same in Ontario and in other countries under English law, and in those which have adopted the system of trial by jury in civil matters.

It was to prevent the abuses occasioned by the judgment of a single judge, and the insufficiency of the courts thus presided over, that in 1864 the Court of Review was established in Quebec and Montreal. This return to the old judicial traditions, excellent in principle, if the blow given to decentralization by this court is not taken into account, was found to be insufficient in practice. The implied exclusion of the judges *a quo*, residing in the other districts, placed their judgments in an inferior position to those of the judges of Quebec and Montreal who held the Court of Review in these cities, by taking awa, from the judges of the new districts the power of communicating to the court the motives of their decision.

The bar soon noticed a marked difference in the number of the judgments reversed, in cases coming from the districts of Quebec and Montreal and in those from the other districts, and complaints were made on this subject. The legislature, attributing this inequality to the reason above given, and desiring to remove the causes of the discontent, established the rule, which is still in force, excluding the judge *a quo* from taking part in the judgment in review; but this reform was not sufficient to allay such discontent, which

has now reached its height, and nothing less than the suppression of the court will put an end to it.

A suppression pure and simple of the Court of Review, which would result in bringing back the condemned system of one judge, and in replacing the new grievances by the old ones, would not be very judicious. A plan which would re-establish the old system of a plurality of judges in contested cases, while leaving the present one of a single judge to subsist for preliminary proceedings in ordinary cases, and for summary and default cases, would be preferable.

ARTICLE 6.

The jurisdiction of a single judge is retained in all non-contentious proceedings, cases by default, and summary proceedings and in the preliminary proceedings of contested cases, in contentious matters, up to the adduction of evidence, which, as well as the hearing on the merits and the judgment, will be taken before three judges.

The want of a sufficient number of judges was, as we have seen, the sole reason for the substitution of the system of a single judge to that of the plurality of judges, which was in operation up to the decentralization of justice. The Government then had only twelve judges to place at the disposal of the courts of original jurisdiction in the province. There are now twenty-six, and when the act passed last session, providing for the appointment of a seventh judge at Montreal, shall have been put into force, there will be twenty-seven.

By means of these twenty-seven judges, can we not (with the exception of the districts of Gaspé, Saguenay and Chicoutimi, in which the small amount of business and

other circumstances, do not require a similar change, in fact, are opposed to such a change,) have the Superior Court held in all the districts in contested cases, by three judges. The Commission thinks so, and here are the reasons upon which it founds its opinion.

There will be seven judges in Montreal and four in Quebec. With this number of judges, it seems easy to have at Montreal a court of three judges, sitting permanently, or even of two sections of the court sitting at the same time, as the Superior Court. At Quebec, one section of the court would be sufficient for contested cases; this would always leave a seventh judge at Montreal, and a fourth at Quebec, for cases by default, incidents of procedure, summary matters and proceedings in chambers.

For the other districts, namely, the districts of Rimouski, Kamouraska, Montmagny, Beauce, Arthabaska, Three Rivers, Bedford, St. Francis, St. Hyacinthe, Richelieu, Iberville, Beauharnois, Ottawa, Terrebonne and Joliette, fifteen in number, there remain thirteen judges, to whom it would be necessary to add two others, one for the district of Beauce and one for that of Terrebonne, so as to give one judge to each.* It would be easy to divide these fifteen districts into five circuits *arrondissements*, of three districts each, and these fifteen judges into five groups of three, to administer justice in the circuits composed of the districts in which they reside.

The above districts, divided into threes, would form these five circuits:

First circuit.	Rimouski, Kamouraska, Montmagny.

* If a special jurisdiction were created for the district of Gaspé, the two judges of that district might fill up the blanks in this plan for the districts of Terrebonne and Beauce.

Second circuit.	Beauce, Arthabaska, Three Rivers.
Third circuit.	St. François, St. Hyacinth, Richelieu.
Fourth circuit.	Bedford, Iberville, Beauharnois.
Fifth circuit.	Ottawa, Terrebonne, Joliette.

The following is the manner in which the Commission proposes the new system should be worked, requiring, as it does, the sub-division of the Superior Court into two divisions; the first to be presided over by three judges, who will hear the evidence, decide the merits of contested cases, and sit, in review, or in the first instance, upon certain specified incidents; and the second division, to be held by one judge, who will decide cases by default, summary matters and proceedings, incidental to the trial of contested cases.

ARTICLE 7.

For the purposes of the above article, the Superior Court is divided into two divisions The first division, held by three judges, of whom two shall form a quorum, shall hear the evidence in contested cases, and decide such cases on the merits, with power of review over certain interlocutory judgments of the second division, as set forth in the Code of Procedure, and the second division, held by one judge, shall, in addition to non-con-

tentious proceedings, take cognizance of cases by default, summary matters and proceedings incidental to the trial of contested cases.

ARTICLE 8.

In the districts of Quebec and Montreal, both these Courts shall be held by the ordinary judges, in two sections of the first division, for Montreal and one for Quebec, each composed of three judges. The seventh judge at Montreal and the fourth at Quebec shall hold the second division in each of these two districts.

ARTICLE 9.

In the other districts, divided as above stated, into five circuits (*arrondissements*), each composed of three districts, the second division shall be held by the resident judge of each district, which will remain under his special charge, and the first division, which will be held alternately and at fixed periods in each such district of the circuit, shall be presided over by the judges of the three districts, which three districts will be under the joint charge of the three judges, in matters within the jurisdiction of that division, as the business of the second division will be within that of each judge in his own district.

ARTICLE 10.

Within the province of the first division, the jurisdiction, privileges, powers and duties of the three judges of each circuit, will be the same as if they had been jointly appointed for each of the three districts, or for the whole circuit, and within the province of the second division, the jurisdiction, privileges, powers and duties of each judge shall be limited to his own district, and remain as they now are.

ARTICLE 11.

These fifteen districts shall be collectively known as "circuit districts" or "rural districts," and each under its own name, and the districts of Quebec and Montreal shall continue to be known under their own name, and shall be called, collectively, "city districts."

Each of the five circuits shall also be known under a special name, which will be that of one of the districts of the group of which such district forms part.

The first circuit shall be called Kamouraska Circuit; the second, Three Rivers; the third, St. Francis; the fourth, Iberville; and the fifth, Ottawa.*

* To the first three and to the fifth of these circuits, we give the names of Kamouraska, Three Rivers, St. Francis and Ottawa, because these were old districts erected before judicial decentralization, and the name of Iberville is given to the fourth, on account of its relative importance and central position in the group.

The entire range of the changes introduced in the organization of the Superior Court, is briefly set forth in these articles.

The advantage of substituting the first division for the Court of Review, cannot be doubted. This substitution takes away one degree of jurisdiction, and, in consequence, exempts suitors from the expense and loss of time occasioned by a second trial. In the rural districts, the cases will, instead of necessitating the transmission of the records, and occasioning expensive journeys to the parties, be decided on the spot. Each case will be finally decided before its own Court and home judges, as for the purposes of the first division, the three judges of the circuit shall form a distinct tribunal for each district, and the three districts shall be their common care, as each district will, for the purposes of the second division, remain the special charge of the resident judge.

This centralization of the justice of three districts into one circuit, would be the complement of the judicial decentralization, carried out in the province twenty-five years ago, and the sequel and perfection of that system, especially as the proposed plan requires, to avoid destroying its equilibrium, the residence of a judge in each district, and especially in the districts of Terrebonne and Beauce, in which there are none now.

From another and an outside point of view, but one which is not without its weight, the holding of these Courts by three judges in the new districts, unaccustomed to the solemnity of such Courts, can serve but to add additional lustre to the administration of justice, and increase its moral influence. The new sections of the bar, lowered by the now too-carelessly accepted idea that they are inferior to the older ones, awakened by a legitimate emulation to a sense of their worth, would soon assume

their proper position in their profession, and rank with their brethren of the older sections.

Those who recollect the time before the decentralization of justice, who would wish to have an idea of the emulation created by a Court presided over by three or four judges, and the apathy produced by a Court presided over by one only, have only to recall the meetings of the Courts before 1857, and compare them with those of to-day. The strange mingling of puerile regrets for the past with unjust blame for the present, has only one object, that of causing the noble ambition, with which the introduction of the new system would inspire the legal profession, to be understood.

The public examination of witnesses before the Court which hears contested cases on the merits, exists under the present system, but there are defects in it which paralyze its usefulness and destroys its efficiency. The general rule, laid down in the Code of Procedure, obliges the judge to take notes of the oral testimony, but this rule is embarrassed by exceptions, which allow parties to substitute the taking of evidence privately, as under the old system, or to proceed before the judge with several cases at once, thus requiring the participation of the Court, only to decide objections and close the depositions. This is not at all the taking of evidence before the Court, which European publicists and the judicial experience of all countries agree in pronouncing excellent.

One of the defects of the taking of evidence in this manner, is also the long delay between it and the hearing on the merits and the judgment.

The length of suits arises, in a great measure, from the delays in the trial under these conditions, and the length of time taken in adducing evidence. The latter abuse is the plague of the administration of justice. The chief defect in the present system is to allow the evidence to be

taken at the pleasure of the parties, who increase its volume and delay it by prolonged postponements, either agreed upon, or obtained from the courts for futile reasons. The costs of taking evid[illegible] this country amount to a fabulous sum, and have t[illegible]come a judicial calamity.

The remedy for this continually increasing evil will be found in the fact that parties will be compelled to proceed strictly, within the delays, to the adduction of evidence, before the court, and without any interval, to the hearing upon the merits. We will see later that the judgment itself shall, unless under exceptional circumstances, be given within short delays.

Is there nothing fatal to public order in cases, even the most unimportant, being, without any cause, put off from term to term, prolonged from year to year, and continued from decade to decade? Is it not stranger still that with such good laws to protect the basis of the law, we have some that are so unfitted to regulate its practice, and that amongst the numerous statutes passed to reform our judicial procedure, it has never entered the mind of our legislators to pass one to make cases proceed compulsorily, and thereby shorten them?

Let it not be objected that such an act would be a violent one and an attack upon individual liberty! There is no liberty in indefinitely delaying the work of justice. Whoever claims before the courts the exercise of a right, should be anxious to obtain it, and if he regrets having gone to law, the litigant should soon wish to be out of it. Few have become rich thereby.

This remark is addressed to both parties; to the plaintiff who should not allow his claim to rest, and to the defendant who should not have the power to escape from it by indefinitely delaying payment. Every law based on a principle opposed to such a result, would therefore not only be

proper but judicious, and it is such a law that the Commission proposes.

According to the proposed measure, no case should last in the first court more than two or three terms, one year at the longest, and, as a general rule, the term next after their entry into court should see the greater part closed.

Again, this delay of a year should not be allowed for pressing matters, and those of a commercial nature and other urgent cases, which in all Codes of Procedure are commonly called *Summary*, and which are not unknown even in our own system, although the difference between these and other matters is not very distinctly characterized. But let us not anticipate.

GENERAL CAUSES FOR THE DELAYS IN SUITS.

Outside the abuse arising from arbitrary delays and indefinite postponements, three different kinds of obstacles hinder the progress of cases before the courts, and delay their issue:

1. The too infrequent holding, and that at too long intervals, of the courts;

2. The too long and too numerous delays, and the excessive multiplicity of forms;

3. The formal and dilatory nature of our system of jurisprudence, which pays more attention to the form than of the substance.

We will treat of these defects in their order and indicate their proposed remedy.

I.

THE TOO INFREQUENT HOLDING OF THE COURTS.

Under the French domination, the civil tribunals sat in permanence, or at least every week. This was also the

practice for the courts in France. As distinguished from this system, we have that of *Terms*, used in England.

Under the first system, the courts are open during the whole judicial year, and they sit every day, or every week, during a certain number of days determined by the public requirements; the rule is that every day of the year is a day for hearing cases or for the sitting of the court; we here use the word "court day," borrowed from the English system.

In England the permanent holding of the courts is incompatible with trial by jury before the Court of *Nisi Prius*, sitting at regular and periodical intervals and under the jurisdiction of the High Courts held at Westminster Hall. These latter courts, deciding upon the verdict, can only sit after the assizes, and divide their sittings into as many terms as there are assizes.

The system of terms and the permanent holding of the courts are irreconcilable with trial by jury. In the English practice, the holding of the courts is so inseparable from the terms that we can hardly think of one without associating it with the other, and these two words are, so to speak, synonymous.

These two systems have in turn formed part of our system. We had the permanent holding of the courts under the French system, and the English system gave us terms. Is it not, however, evident that in a country in which trial by jury is not the ordinary method of trial in civil cases, in which in all cases the evidence is taken and the argument heard before the same court, at the same time, and before the same judges, where law and fact are mixed, this system, which is pregnant with anomalies, is nonsensical and ends by being absurd?

It established the taking of evidence privately, replacing the courts of ***nisi prius*** by the court for the adduction of

evidence. The courts for the adduction of evidence are, it is true, presided over by judges, but by judges who do not know anything of the evidence adduced save what they are told when objections are raised, and which they are called upon to decide. This distant participation of the judge in the taking of the evidence cannot give to it the character of evidence publicly taken before the court, and which, by common consent, is recognized both by theory and practice, as superior to evidence privately taken, and its indispensability proclaimed.

This adduction of evidence publicly taken, sitting the court, and under the eyes of the judges who both see and hear the witnesses, whose depositions they dictate, and immediately followed by the hearing (a condition necessary to its efficiency) and the system under which separate terms for the adduction of evidence are the only times when the court can lawfully be held, are incompatible.

Under the permanent system, the courts hear cases every day in the year, or the first day of each week, and decide them during the same week, the latter portion of which they take to decide the cases heard in the former.

Under the system of terms, the courts devote, out of every year, three, four or five months, according to the number of terms, to the hearing of cases, and the interval between two terms to deliberate, and render judgment during the term following such deliberation.

Before the decentralization of justice, the practice at Montreal was as follows: There were every year four terms fixed by law, lasting from twenty to twenty-five days each, and which the judges could neither shorten or lengthen; each term was exclusively devoted to hearings on the merits and on incidental proceedings, the evidence having been taken during the preceding vacation. With the exception of some routine proceedings, it was unheard

of that a case, even for hearing in law or any other incident, should be decided before the term following that in which it was heard, and very often before several terms. At the end of every term, the forty, fifty, sixty or more cases heard during the term would be placed under advisement, and one of the judges would hold a court for taking evidence during about twelve days in the vacation, during which time also the jury cases would be tried.

Can there be any difficulty in choosing between these two systems, in one of which cases are decided the day following, or within two or three days after the hearing, while, in the other, cases are kept under advisement, during one or two months after the hearing, and then judgment is rendered in three or six months later.

It is true, that recent statutes, in which, although not formally enacted and even vaguely noticed, the idea of permanent sittings appears, have considerably modified the old system, by allowing judges to fix special terms, or to prolong the regular terms, with the option of rendering judgments in vacation, and have so remedied, or furnished the means of remedying, the most striking defects of the system, but it is none the less true, that the new laws have left the principle still in force, that a limited part of that judicial year alone constitutes the Court days, that the others are *dies non* or non-juridical days, and that those not specially indicated as juridical days, are not Court days.

Instead of being an exception and requiring a special provision to give them their juridical character, all the days of the year shall, under the new system, be Court days, and those alone, which are excepted, shall be days of vacation,*

* The word vacation here used, is not used in the sense of the long or summer vacation, but in the sense of the interval between two terms.

and even during such vacation, the judges will be obliged to sit, when there is business before the Court.

The permanent holding of the second division, will not be difficult in the city districts. There will always be a seventh judge at Montreal and a fourth at Quebec, to perform this duty, and, in the circuit districts, the judge in each district, who, in his absence, will be replaced by the county judge, will remain long enough at the *chef-lieu*, between the sittings of the first division, held in the other districts of the circuit, (*arrondissement*) to perform the duties of the second. The despatch of business will be further facilitated by the option given in the scheme proposed by the Commission, to the judge to decide in chambers the greater part of the business of this division.

As to the permanent holding of the first division, it will not cause great inconvenience at Quebec and Montreal, in which three in the former and six in the latter place, will be always at hand, as they are not obliged to hold the lower court.

It cannot be so, on account of the separation of the judges, and it is not necessary that it should be so, for the first division in the circuits. In these districts, the business of this first division, confined to the taking of evidence and hearings on the merits, with a few reviews of judgments rendered by the second division, will not be very large. The taking of the evidence itself, which should not be considered such a formidable matter, reduced to its proper proportions, and going only into facts pertinent to the issue, will be comparatively easy and of short duration, when simplified by the articulation of facts, suggested by the the Commission, that is, a real articulation in place of the sham one which now bears that name, in which parties kept within proper bounds by the threat of severe

penalties against bad faith, will deny only such facts as are really in dispute.

The hearing on the merits, coming immediately after the evidence, before the judges before whom it was taken, and who, in consequence, understand the case as well as the advocates themselves, will take place under similar conditions.

If, in addition to the facilities afforded the Courts for the prompt despatch of business in the circuits, we take into account the limited number of complicated suits or suits of long duration that are brought within their jurisdiction, we would see, and a long judicial experience in the districts, that are to form the circuits, has convinced the Commissioner, that three terms of the first division, of ten or twelve days each, held every third month in each of the districts, would be amply sufficient to dispose of the business. This would reduce the absence of the judge from his district to sixty or seventy days, during which he would be replaced by the county judge,* and during the rest of the year, he will be able to attend to the business of the second division and the Criminal Court, whose two terms last barely eight days each in these districts.

From a personal point of view, the enforced absence of the judges, to hold the first division in the two districts of their circuit away from their residence, an absence of short duration compared to the requirements of the old system, under which they were absent during six months of the year, will be rendered much easier to bear, owing to the facilities of communication, as, in more than half the cases, they may leave for the *chef-lieu* of the outside district the

* So as to make this officer as useful an auxiliary to the superior judges, as the Commission expects, care should be taken not to fix the terms of the County Court in the circuits, during the holding of the first division, when two of the judges are absent from their residence and the time of the third is occupied.

evening before or the morning of the holding of the Court.

We have just stated that the judge would dispose in Chambers of the greater part of the business of the second division. In effect, what is the good of compelling the judges to hold a Court for default cases, motions of course, the settling of articulations of facts, the appointment of experts and other similar incidents.

The rule proposed on this point is that whenever the Code of Procedure does not prescribe that any incidental proceeding shall be heard before the Court, it may be heard in chambers, and, if circumstances prevent the judge from attending in chambers, then at the residence of the judge.

Each district, including Montreal, having, under the proposed plan, a sufficient number of judges at its disposal, the services of each judge are to be exclusively devoted to his own jurisdiction, and cannot be required for outside Courts. In place of taking them from among the judges of the lower court and thus expose the ordinary judges to inopportune removal and disturb the service in each jurisdiction, under this system, the assistant judges for the Appeal Court and for the court of original jurisdiction, shall be chosen from among the senior advocates and counsel, as is done in France, and has already been done in this country, to the satisfaction of both bench and bar.

The manner of replacing incompetent judges by assistant judges, (*juges-suppléants*) will be shewn in the articles referring to the duties of the advocate-general, upon whom their nomination will devolve, in concert with the chief justice and puisné judges, the bâtonniers of sections and representatives of the bar not incorporated into sections, within the jurisdiction in which such replacing is required.

By all these reasons, therefore, it is proved that the permanent holding of the first division is not more difficult in the circuits than in the old districts.

We have stated above, that every day in the year shall, unless excepted, be a "court day" for both divisions. We have just shown that no exception is necessary for the second division, which should sit in chambers or in court every day in the year on which there is business to be attended to, and have added that every proceeding within the jurisdiction of this division may, with the exception of certain cases noted as those to be heard in Court, be heard in chambers, or at the judge's residence, if required.

It is not so with the first division, which should not be required to sit, except during a part of the year proportionate to the time at the disposal of the judges and to the amount of business in each district, in which, as a rule, they should sit in open Court.*

Besides, the fact that this proportion varies in the different districts, and that it would be difficult to base a calculation of the time, during which such division should sit, upon the actual number of cases in each, this number may vary from year to year and require the calculation to be modified; it would not, therefore, be judicious to establish an absolute rule for the duration of the terms in each city—district and each circuit. It is better to allow the Courts themselves to fix the terms, as they know the wants of their jurisdictions, with power to modify the tables of terms hereafter, if circumstances require it.

The Commission, on this point, proposes the following: In the jurisdictions of Quebec and Montreal, the chief justice of the province or the chief justice of Montreal, and the puisné judges of either of the two districts and of the five circuits, at a conference held in the cities of Quebec and Montreal, at which conference shall attend the advocate-

* In extraordinary cases, or when the interests of the parties and the needs of the public service require it, the first division may hear cases out of Court, but this exception shall only be allowed in cases of urgency.

general and bâtonniers of each of the two city districts, and for the circuits, the same advocate-general or the bâtonniers of Three Rivers and St. Francis and an advocate chosen for each circuit, in which there is no district having in it a section of the bar, shall prepare a table of the number, date and duration of the terms of the first division, for each of the two city districts and for each circuit. Such table shall be forwarded to the Government, and be, with or without amendment, put into force by proclamation.

This conference for each jurisdiction shall be held and the convocation of the judges, bâtonniers and advocates shall be made at the instance of the Advocate-General.

Notwithstanding this table, and outside the fixed periods, the judges may, of their own accord, hold sittings of the first division in each of the two city districts, and in any circuit districts where these special sittings may be necessary, and it shall even be their duty to hold such sittings, if they can do so, without imposing too much work upon themselves, or interfering with ordinary business.

It shall also be lawful for the judges, in the event of the roll being exhausted, to shorten the terms before the expiration of the period fixed by the table, as it would be their duty to continue the terms if these rolls are not exhausted and if there was still business before the court, but in the circuit districts, this shortening of the term cannot take place so long as there are cases under advisement.

II.

THE MULTIPLICITY OF DELAYS AND THE COMPLICATION OF FORMS.

We must now show, that, notwithstanding the reorganization of the courts, they can only render a tardy and inefficient justice, owing to the complication and delays

of the procedure now followed, based upon old ordinances and especially upon that of 1667, unless in reforming such procedure to make it suitable to the requirements of the age, we give it what it now lacks, promptness and simplicity.

The ordinance of 1667, whose chief merit was to render procedure uniform and to reduce it to a general and regular system, applicable to all the courts in France, up to that time governed by different usages, was, notwithstanding its superiority over previous laws, far from being a perfect work.

This ordinance, almost our sole Judicature Act under the old system, was not suited to the wants of a new country and the simplicity of its social relations.

Apart from the organization of our courts, based upon the judicial system of England and certain forms of procedure, special to the English practice, the Judicature Acts of the province are, however, based upon that ordinance which was in full force at the time of the promulgation of the Code of Civil Procedure in 1867, two centuries after that of the ordinance.

In place of containing the reorganization of the judicial system of the province and a reform of the procedure of its courts, to render it equal to the requirements of the time and the tendencies of a new social condition, the Code of Civil Procedure was only a consolidation of the old ordinance and our ancient laws, and a blending of their provisions by means of a few amendments introduced to fill up gaps and hide its defects. This view of the character of the code is admitted in the report of the Commissioners themselves.*

As a theoretical view of the law, and as a memory of judicial traditions, the Code of Procedure may be

* See the eighth report of the Commissioners. Page VIII.

considered as a remarkable work, but as a system of judicial practice, which should have aim at the shortening of suits, the simplicity of their forms and their prompt decision, it was a work of no practical utility and it is now out of date.

It must therefore be reformed, commencing with the shortening of the delays of the three principal phases of procedure, summons, contestation, and proof.

OF SUMMONS.

It is unnecessary to state that the delays upon summons, fixed at a time when travelling through the country took as many days as it now takes hours, and those of the contestation which, under most favorable circumstances, take two months and over, greatly delay the progress of cases. Add to these delays the suspension of proceedings occasioned by preliminary exceptions, and we have, as a result, a year of litigation before proof can be adduced.

The Commission proposes to reduce the delays on summons to a fixed term of eight days, wherever made and whatever may be the distance from the place of service to the court whence it issues, increased by a further delay of six days to plead to the merits, and of three days only to produce preliminary exceptions.*

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* Under the procedure suggested for summons and contestation, the return day of the writ will not be mentioned in it. In accordance with the practice introduced by the new Judicature Acts now in force in England, adopted by the Province of Ontario, and which have for a long time been in use in France, the defendant is summoned to appear within the delay fixed by law, that is to say, according to article 12, within eight days after the service of the summons.

Within these eight days the plaintiff returns his action, and if he does not, a certificate of default and non-suit is taken against him, and when the writ is returned, if within this delay of eight days, increased by the delay allowed to plead, the defendant has not appeared or pleaded, proceedings are had against him by default. In fact the defendant has the same delay to appear as to plead, and both acts may be done at once.

The advantage of this innovation, with a view of rendering the proceedings

The following articles of the Code express its views.

ARTICLE 12.

Wherever may be the place in the province in which a summons is served, within the jurisdiction of the Court or in another jurisdiction, and whatever may be the distance of such place from the Court before which the defendant is summoned, the delay on the summons shall be eight days, without any additional delay by reason of the distance between the place of service and the Court.

ARTICLE 13.

Within this delay, increased by the delay to plead, which is three days for the production of preliminary exceptions, and six for pleas to the merits, the defendant must appear and plead his preliminary exceptions or to the merits, as the case may be.

ARTICLE 14.

If, within the eleven days after the service of the summons, the defendant has not appeared, or if he has

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more simple and rapid is plain; it is also a means of overcoming the artifices of a fraudulent debtor who, knowing that a writ has been issued against him and that it must be served within a short delay, hides himself during the short time required for the service, and compels the creditor to take a new writ.

A stranger amenable in certain cases to the jurisdiction of our courts, is only to make a short stay in the province. His creditor takes a writ in advance and has him served during his stay, which is otherwise too short to allow him to take his writ and have it served, and so in other cases.

The duration of the writ should, however, be limited. Under the English statute it lasts six months, after which, if it has not been served, it must be renewed.

appeared and has not produced a preliminary exception, he is *de pleno jure* deprived of the right to produce it; no such preliminary exception shall be, under any pretext, allowed after the expiration of the time fixed, and the foreclosure shall be absolute.

ARTICLE 15.

If the defendant has appeared within the delay of eleven days and has not produced preliminary exceptions, he has an additional delay of three days, after the expiration of the eleven days, to plead to the merits, and, if within these eleven days, he has not appeared, he has the same delay of three days to appear and plead to the merits, and if, at the expiration of fourteen days after the service of the summons, he has not appeared, a default to appear is established against him, and he shall be proceeded against by default.

ARTICLE 16.

If he has appeared but has not pleaded, he is likewise deprived of his right to do so, and he is proceeded against *ex-parte*.

ARTICLE 17.

In the case of preliminary exceptions, the delay of six days to plead to the merits only begins to run from the day upon which they are disposed of.

ARTICLE 18.

If a defendant has several of these exceptions to set up, he must allege them all at once and in the same plea, notwithstanding their apparent incompatibility, and proceedings shall be taken at the same time upon each, without prejudice to the others.

ARTICLE 19.

No answer or reply to these exceptions shall be necessary, and the plaintiff, who does not admit them, shall be considered as holding them unfounded in fact and in law.

ARTICLE 20.

The procedure upon and trial of these exceptions shall be held before the second division, and the adduction of evidence, hearing and judgment shall be proceeded with according to the forms and within the delays for summary proceedings.

ARTICLE 21.

The day after the foreclosure from appearing or pleading to the merits, the plaintiff may inscribe for judgment by default or *ex-parte*.

In personal actions for simple debt, whatever may be their nature and cause:

1. If the action is founded upon an authentic document or a private writing, appearing to have been signed by the

defendant, or having his mark affixed thereto before one or more witnesses and the signature of one or all attested, and if the writing is a complete proof of the debt, upon the production of such writing;

2. If the writing does not make complete proof of the debt, and some further and additional proof is necessary to establish it, on production of the writing, and of a deposition of the plaintiff or of a witness not legally incapacitated, sworn to before the clerk or a commissioner to receive affidavits, taken at the time of the institution of the action,* or at any time after the service of the summons, to the effect that the debt is lawfully due;

3. Or, if there is no writing to support the demand, upon production of a deposition in the nature of that mentioned in the preceding paragraph;

The clerk at once draws up the judgment and submits it to the judge, who, after verifying to his satisfaction the regularity of the service and the compliance with the provisions of this article, initials the same on the same day or on the day following that upon which it was submitted to him, and this initialing constitutes a valid rendering of the judgment.†

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* That is to say, that in taking the writ, the plaintiff may produce an affidavit made by himself or by another person, swearing to the lawfulness of the debt, and in cases by default, this affidavit shall serve as if it was filed at the same time as the inscription for judgment.

† This article has for its object the extension to all actions of simple debt, as distinguished from those which are not, as for example, actions of damages, the existing provision which permits the taking, in a certain number of cases only, judgment against a defendant by default, without further proof than the oath of the creditor. The reason of this proceeding being the same in all, why not extend this principle to all cases?

ARTICLE 22.

If, however, the case is not susceptible of proof by oral testimony, or if the judge for any other motive, within his discretion, has reason to suspect the good faith of the plaintiff or to doubt the lawfulness of the claim, he may withhold the initialing and order proof to be made in the ordinary manner.

ARTICLE 23.

In other actions, that is to say, those for anything other than a simple debt, the plaintiff cannot claim the benefit of the above articles 21 and 22, but must adduce evidence in the ordinary manner, and it is only after the proof is concluded, that the clerk draws up the judgment, which, as laid down in article 21, he places before the judge, who, on the same or next day shall dispose of the case by maintaining or rejecting the demand, but in this, as in the preceding case, the initialing by the judge is considered as the rendering of the judgment.

ARTICLE 24.

The above provisions, respecting cases by default and *ex-parte*, apply to cases in which the defendant has been summoned through the newspapers, or to those accompanied or followed by provisional measures and to all cases of valid service.

ARTICLE 25.

After the expiration of the delay to plead to the merits, no plea shall be received, not even with the consent of the other party, without the authorization of the judge.*

ARTICLE 26.

Demurrers shall no longer delay the proceedings and require a hearing in law, but they shall be proceeded upon as hereinafter provided in articles 44, 46, 48, 49 and 50, at the same time as the incidents to the articulation of facts.

OF THE CONTESTATION.

ARTICLE 26a.

Replies to pleas of general issue shall no longer be necessary, and by this plea, if there is no other, the issue is *ipso facto* joined.

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* The enforcement of the rule which prescribes the compulsory proceeding in cases within the fixed delays, is found in article 25, that is to say, in this article, which compels the defendant to plead to the merits, within fourteen days after the service, under penalty of foreclosure; in article 32, which compels parties who wish to adduce evidence, to prepare a statement of the facts which they wish to prove, within four days after the issue is joined; in article 46, which forces parties who have objected in law to the articulation or who have, during the pleadings, produced demurrers to have their objections or demurrers decided by the judge of the second division, within four days after the production of the answers to the articulation; in article 56, which, under penalty of foreclosure, provides for a review before the first division of the judgment of the second division, upon the objections in law to the articulation, or on the demurrers, within four days after the rendering of the judgment; and, in articles 64 and 65, which allow the defendant to demand the dismissal of the action, if the plaintiff does not inscribe his case for hearing on the merits within the prescribed delay.

It shall no longer be permitted to plead a general denial simply, and every plea which does not contain a categorical or qualified denial in numerical order * of the facts set forth in the declaration, or an affirmation on behalf of the defendant, that he is ignorant of the truth of the fact, shall be struck and the facts not so denied, absolutely or in a qualified manner, of which the defendant has not declared himself ignorant, shall be held to be admitted.

ARTICLE 27.

If the pleas are special, the plaintiff has only four days to answer, without its being necessary that the defendant should apprise him thereof

ARTICLE 28.

If, within these four days, the plaintiff produces general answers, in fact or in law, or both together, to these special pleas, or if he does not answer, the issue is joined.

In the same manner, if he answers specially, in fact or in law, or in both at once, these answers join the issue, unless by permission of the court, the defendant produces, within a same delay of four days, special answers which equally join the issue.

* We will see in the draft of the Code of procedure, under the title of summons, that the facts on which the claim is based shall be alleged *seriatim* in numerical order.

ARTICLE 29.

Upon production of an incidental or cross demand by the defendant, the contestation shall be made as upon the principal demand in accordance with the above rules.

ARTICLE 30.

The same will apply, except in the cases in which another proceeding is prescribed, to every demand in warranty, incidental demand during the progress of any case, opposition, intervention, and in every case in which the parties occupy the respective positions of plaintiff and defendant.

ARTICLE 31.

All distinction between perpetual and temporary pleas is removed, and every plea to the merits, whether its effect is perpetual or temporary, shall henceforth be known under the generic name of plea, the term *exception* being reserved for preliminary exceptions.*

ARTICLE 32.

Within four days after issue is joined, each party serves the opposite party with a numbered summary or

* The object of this article is to put an end to the confusion arising from errors committed by the parties in the naming of their exceptions, and to the distinction between perpetual and temporary exceptions, which is in truth of no practical utility, the generic name of plea applying, with equal propriety, to every means of defence.

an articulation of the facts which he intends to prove when evidence is to be adduced. A copy of the declaration, of the plea, or any other document used in pleading, shall, in future, not be sufficient to replace this articulation.

ARTICLE 33.

The facts articulated must be pertinent to the issue. It is not necessary that they should be a repetition of those already contained in the pleadings, provided they are connected therewith.

ARTICLE 34.

All facts are pertinent if they tend legally to sustain the conclusions or to corroborate the allegations of the party invoking them, or to contradict or modify those of the opposite party.

ARTICLE 35.

Deeds or writings not already set forth in the pleadings, and which the parties intend to produce, shall be mentioned in the articulation.

ARTICLE 36.

The day following the expiration of the four days, the parties produce in the office, these articulations with the deeds or writings, or a copy thereof if private writings, mentioned in the articulations.

ARTICLE 37.

The evidence to be adduced by the parties must be confined to the facts articulated, and the default to produce an articulation on the part of one or all the parties, within the prescribed delay, is equivalent to a declaration that the party or parties, relying upon the proof already made by the pleadings produced, or by the express or implicit admissions therein, have no oral testimony to adduce, and they will not be allowed to adduce any.

ARTICLE 38.

Within four days after the production of the articulations, each party, categorically and in numerical order, answers each articulation of the adverse party, admitting or denying absolutely, or in a qualified or modified manner, or declaring that he is ignorant of the facts articulated, and has his answer served. This answer is fyled in the office on the day following these four days, with the deeds or exhibits mentioned in these answers, whether originals or copies.

ARTICLE 39.

Default in the production of exhibits with the articulation or answer, will not have the effect of suspending the proceedings, and the enforcement of the above articles, unless after notice for the next day given to the party in default, the adverse party obtains

an order from the judge of the second division, fixing the delay within which these exhibits shall be produced, which delay being expired, with or without the production of the exhibits, the proceedings are resumed.

ARTICLE 40.

The simple or qualified denial made by a party of facts which are proved later, or the declaration that he is ignorant respecting them, renders such party liable for the costs of the proof made by the opposite party and which the admission of these facts would have avoided.

ARTICLE 41.

If, from the whole evidence, it appears that a party was aware of the truth of one or more facts, denied or admitted in a qualified manner, or of which such party has declared that he was ignorant, and that he acted in bad faith, the court may, even in the event of such party succeeding, in whole or in part, upon the merits of the suit, in its discretion allow him no costs against the adverse party, and even condemn him to pay to the latter the whole or a part of the costs of the evidence or of the suit.

ARTICLE 42.

Before answering or after having so answered in fact to each articulation, the party may object to the

pertinence of each articulation, as not founded in law and without legal effect upon the cause, by declaring before or after each answer that the articulation, or part of the articulation, is unfounded in law, or stating generally, as it is now done in demurrers, but without being obliged to allege special reasons, that the proceeding, declaration, plea or answer to which the articulations refer, is unfounded in law.

ARTICLE 43.

A party also may answer in law only and not in fact, to each articulation, or take objection in law, *in globo*, to all the articulations, or simply state that the pleadings to which the articulations refer are unfounded in law, but in the case of the present article, the articulations shall be taken to be wholly or partly admitted in fact.

ARTICLE 44.

The party who, in the contestation, shall have produced a plea or answer in law may, in place of objecting in law to all the articulations or to the pleading to which these articulations refer, state with the same effect that he renews his plea or answer in law.

ARTICLE 45.

The default to answer the articulations in whole or in part, and produce these answers within the time

fixed by Article 38, is also considered as an admission, *pro toto* or *pro tanto*, of the truth of the articles articulated.

HEARING ON OBJECTIONS TO ARTICULATIONS OR ON PLEAS OR ANSWERS IN LAW.

ARTICLE 46.

Within the four days next after the production of the answers, the party who has objected in law to the articulations of the adverse party, or who, having produced a plea or answer in law to the declaration, has, in his answers to the articulations, in the terms of Article 44, declared that he renews the same, may, after four days notice given to the adverse party, require, on the day fixed in such notice, the second division to maintain his objections, upon which the parties shall be heard. If the party who has produced the objections and given the notice does not appear, on the day fixed, to support his demand, his objections, or pleas, or answers in law shall be rejected.

ARTICLE 47.

All other objections of a similar nature, made by other parties who require them to be maintained, shall, without requiring any other notice, be argued at the same time, and no separate hearing on any such objections shall be had thereafter.

ARTICLE 47*a*.

The default of a similar notice within the required time, shall be considered as a waiver of the objections, and pleas, and answers in law.

ARTICLE 48.

Judgment upon these objections shall, in so far as it is possible, be rendered on the day that they are heard, or on the next day.

ARTICLE 49.

If all the objections are maintained or rejected, the case shall, saving the right of appeal against the judgment hereafter allowed, proceed in the former case as if no articulations had been produced, and in the latter as if no objections had been made.

If a demurrer to the whole action is maintained, the action shall be dismissed, and if some of the allegations of the declaration are struck on the demurrer, or the whole or portions of the pleadings on the answers in law, this judgment shall have the same effect as if it had been founded upon answers in law to the articulations.

ARTICLE 50.

If the maintenance of one or more objections made by any of the parties under the circumstances set forth in the preceding articles, require the modification

of the articulations of one or all of the parties, the court shall prepare a conclusive statement or *procès-verbal*, according to the present practice in jury trials, of the facts to which the evidence of one or all the parties is to be confined; this statement, which may also be prepared by the clerk, under the direction of the court, signed and initialed by the judge and the clerk, shall be placed in the record on the day following its preparation, and the evidence to be adduced by either or all of the parties, as the case may be, shall be in accordance with the statement.

ARTICLE 51.

In case the articulations remain intact, either because the party has not followed up his objections in the terms of Article 46, or because they have all been rejected, the evidence, limited to the facts articulated, is taken as if no objection had been made. The same applies when the second division, in place of maintaining or rejecting the objections, reserves them.

ARTICLE 52.

Notwithstanding the default of articulations and evidence, it shall, however, be lawful for any party to offer, before the first division, his supplementary oath, to defer or refer the decisory oath to the other party in the cases permitted by law, and to interrogate the adverse party under oath, upon articulated facts or as an ordinary witness, as if

articulations similar to the pleadings, had been produced by him or by any party to the case. It shall be also equally lawful for the Court to interrogate the parties upon the decisory oath.

APPEAL TO THE FIRST DIVISION FROM JUDGMENTS RENDERED UPON OBJECTIONS OR DEMURRERS.

ARTICLE 53.

There is an appeal in review before the first division, from judgments upon objections to articulations of fact, or upon demurrers rendered by the second division.

ARTICLE 54.

This appeal is exercised by a simple declaration of the parties or of one of the parties, to the effect that they require the revision of the judgment, made at the time the judgment is made, and sitting the Court, or produced in the clerk's office, within four days after the judgment, after previous notice of one day is given to the adverse party, in the latter case.

ARTICLE 55.

If there is a similar demand on behalf of several parties, these demands are joined and form one common appeal.

ARTICLE 56.

In default of a declaration within the [illegible] prescribed, the parties are deprived of their appeal, the

judgment has the authority of *res judicata*, the evidence, if any is required, is taken according to its provisions and it becomes executory without appeal, if it has dismissed the action.

ARTICLE 57.

This demand in appeal, upon which the parties are heard, in the manner prescribed in article 78 and following, does not prevent the inscription of the case upon the rolls of the first division, as if no appeal had been demanded.

INSCRIPTIONS BEFORE THE FIRST DIVISION.

ARTICLE 58.

There shall be two rolls for the first division, kept by the clerk, the roll for proof and hearing, for cases in which evidence is to be adduced, and a roll for hearings in law, incidental proceedings and upon the merits.

ARTICLE 59.

Are inscribed upon the roll for proof and hearing:

1. Cases in which an articulation and answers have been produced within the prescribed time, without objections in law;

2. Those in which objections or demurrers having been filed, have been abandoned in default of notice of application to maintain the objections and demurrers, or have been

rejected in default of a similar demand after notice, according to article 46;

3. Those in which objections or demurrers have been rejected by judgment that has acquired the authority of *res judicata*, in default of appeal.

ARTICLE 60.

Are inscribed upon the roll for hearing in law and on the merits:

1. Cases in which, in default of articulations of both parties, no evidence is allowed to be adduced;

2. Those in which by mutual default to answer, the articulations are taken as admitted;

3. Those in which an appeal is taken from the judgment upon the articulations.

ARTICLE 61.

Within the categories of article 59, cases are ready for inscription for proof:

1. In the case of paragraph 1, three days after the time allowed to object in law;

2. In the case of paragraph 2, three days after the abandoning or rejection of the objections and demurrers, in default of notice or demand of maintenance of these objections and demurrers, according to articles 46 and 47;

3. In the case of paragraph 3, three days after the expiration of the time allowed for appeal.

ARTICLE 62.

In the categories of article 60, cases are ready for inscription upon the law-roll, as follows:

1. In the case of paragraph 1, three days after the expiration of the delay to produce articulations of fact;
2. In the case of paragraph 2, three days after the expiration of the delay to produce answers;
3. In the case of paragraph 3, three days after the appeal.

ARTICLE 63.

In accordance with the practice followed, each party may inscribe the case on either roll.

ARTICLE 64.

In the circuits (*arrondissements*) if a case is ready for inscription, one month before the next term of the district, and the plaintiff allows one-half of this time to lapse, that is to say fifteen days, without inscribing, the adverse party, who has not already done so, may do so, if he does not prefer demanding at the next term, after one day's notice, the dismissal of the action; and the Court may, in its discretion, grant the default required and dismissal of the action, saving the plaintiff's right to institute another suit, or fix the case for the adduction of evidence, or for hearing in the term itself, if there is time enough, and, in the contrary case and for good reasons given by the defendant, in the following or any other subsequent term.

ARTICLE 65.

The preceding article applies to the districts of Quebec and Montreal, if, after the day upon which a case is ready for inscription, the plaintiff allows two whole terms at Quebec and three at Montreal, to elapse without inscribing it.

TEMPORARY PROVISIONS.

ARTICLE 66.

In all the districts, as well in those of Quebec and Montreal as in those of the circuits, all cases, pending at the time of the coming into force of the new Code of Civil Procedure, in which the issue shall have been joined, but which have not been inscribed for the adduction of evidence shall, in the same manner as those to be instituted after that time, be subject to the above articles.

ARTICLE 69.

In such cases then pending in which issue shall not have been joined, it shall be so joined, according to the new code, and so with the rest of the trial; as to those in which issue shall have been joined, but not inscribed for proof, they shall be subject to the articulation of facts; but, in this respect, the day following the coming into force of the code, shall be deemed within the meaning of article 32, the day upon which such issue is joined.

ARTICLE 70.

Cases then pending and which have been inscribed for proof, or at the same time for proof and hearing on the merits, or for hearing on the merits only, shall at once, and without any proceeding being taken by the parties, be transferred to the roll for proof and hearing of the first division, and the cases inscribed for hearing upon the merits only, shall be, in the same manner, transferred to the law-roll.

ARTICLE 71.

Every case shall be inscribed before the first division sitting in the district in which it is pending.

ARTICLE 72.

In a circuit district, if between the time when the case is ready for inscription and the next term of the first division for the district in which it is pending, one or two terms are to be held in the other districts of the circuit, the case, by consent of parties, may be inscribed upon the rolls of the first division of either of these districts, and shall then be proceeded with in all respects as in a case of such other district.

If, however, in a case so transferred to another district, a hearing is had upon objections to articulations, or upon demurrers, and according to the judgment it is necessary to adduce evidence, the case may be, by a similar consent, retransferred to its own court, there to be tried upon the merits.

ARTICLE 73.

Every judgment rendered by the first division of a second district of the circuit, (*arrondissement*) shall be executed in the first, that is to say in the district in which the case arose.

METHOD OF PROCEEDING UPON INSCRIPTIONS BEFORE THE FIRST DIVISION.

ARTICLE 74.

No inscription before the first division shall be made for any particular term, or any particular day of a term, but it shall be made generally and the clerk shall dispose of it in the following manner:

ARTICLE 75.

1. If the inscriptions are for the roll of proof and hearing, as they are received, or after having received a certain number, the clerk, following the order of the inscriptions, and regulating the precedence upon that order, distributes them over the different days of the next term, according to its first or probable duration, allowing a definite or arbitrary number for each day, according to the number of causes inscribed for the term, and the knowledge that he himself may have, or which may be communicated to him by the parties, of the probable length of each cause.

2. He shall leave a delay of eight days between the day the case is placed upon the roll and the day fixed, and as the cases are fixed he shall, on the same day or on the next day, give notice either verbally or in writing to the parties.

ARTICLE 76.

In the district of Montreal, the cases inscribed upon the roll for proof, or upon the roll for hearing, shall be placed alternately upon either roll of the two sections of the first division, and, regard being had to the business before either section, inscriptions may be transferred from one to the other.

ARTICLE 77.

All cases inscribed upon the roll for hearing shall be fixed for the nearest day of the term following the inscription, provided a delay of four days is left between the placing upon the roll and the day fixed, which day shall be notified to the parties by the clerk, upon the same day or the next following day, as in the case of inscriptions for proof. In the district of Montreal, the inscriptions shall be in rotation from one section to the other, as above prescribed; saving, nevertheless, the transfer from one to the other.

PROCEDURE UPON INSCRIPTIONS UPON THE ROLL FOR PROOF AND HEARING BEFORE THE FIRST DIVISION.

ARTICLE 78.

On the first day in each term, in the circuit districts, the Court shall first hear the cases inscribed upon the roll, in appeal from interlocutory judgments, rendered upon articulations of facts, and upon pleadings in law, and they shall dispose of them *instanter*, if possible, if not, on the earliest opportunity; and, if in consequence of the judgment, evidence is to be adduced, the Court shall fix it immediately for a certain day, among the cases already fixed or to be fixed for proof and hearing, and the clerk shall transfer it to the roll for proof. No absolute delay for the fixing of the proof shall be observed by the Court, which will allow a reasonable delay, determined by circumstances.

ARTICLE 79.

If, in consequence of the judgment, no proof is necessary and the case is to be heard on the merits, the Court shall fix a day for such hearing.

After the hearing of objections and on the pleadings, the cases inscribed upon the merits shall be heard, in the order fixed by the Court, by general rule or rule of practice, or by a special order in each term.

ARTICLE 80.

Evidence adduced before the Court, shall be taken in ordinary writing or by stenography, subject to the special rules of each district of Quebec or Montreal, or of each circuit, or under rules of practice enacted for all or for each of the jurisdictions.*

ARTICLE 81.

The witnesses shall be examined by the parties, under the supervision of the judges, who shall keep the evidence within regular bounds, and not permit,

* The system of procedure for the adduction of evidence, offers so many difficulties that are special to each Court, that the Commission does not propose any rule on the matter, which is altogether arbitrary, and which will be determined by the Courts, the advocate-general, and the bâtonniers and representatives of the bar, as will be seen later. There is, however, one change upon which all seem to be agreed. That is, that in cases in which the evidence is taken by stenography, the stenographer's notes should not be transcribed into ordinary writing, unless in case of appeal. Until that time, the stenographer's notes shall be deposited in the record, and shall be rendered authentic by the signature of the clerk, in whose care and under whose responsibility they remain. If the judges, who have heard the proof and have taken notes thereof, and are therefore already cognizant of it, wish to refresh their memory or to verify the correctness of their notes, they cause the stenographer to appear before them, with the clerk, who is the depositary of the evidence, and have the deposition read by the stenographer. At no time, during or after the adduction of the evidence, shall the latter retain possession of the depositions, which, as soon as they are closed, must be placed in the record, and there remain.

The effect of this reform will be to economise the cost of transcription, which is the heaviest item in the costs for the adduction of evidence, and to protect the deposition against all possible alteration.

Many other improvements might be suggested with respect to the stenographic taking of evidence; the stenographer should, for example, be an officer of the Court, and be under the supervision of the clerk, whose employee he would be, but the Commission thinks it better that the judges and advocates of the different sections of the bar, whose practice in this matter may vary, should be consulted.

even with the express or implied consent of the adverse party, any illegal proof.

ARTICLE 82.

Unless specially derogated from, the adduction of evidence before the Court is subject to the ordinary forms and rules now in use.

ARTICLE 83.

It shall be no longer necessary for a party to interrogate his adverse party upon articulated facts communicated beforehand, but any party may interrogate his adversary upon *vivâ voce* questions. Notwithstanding this derogation, the effect of these interrogatories shall be the same as before the new code.

ARTICLE 84.

Nothing contained in the preceding article prevents the examination of the party as an ordinary witness.

ARTICLE 85.

A case once commenced shall continue until the witnesses of all the parties have been examined ; the Court, however, may, if the ends of justice require it, suspend the adduction of evidence in a case, during a part of the sittings of the Court or during several days, continue it to a particular hour of the sittings or to a future day, to hear

witnesses of the party then adducing evidence, or those of the other party. This suspension is within the discretion of the Court, which, without good reasons, based upon the interests of justice and those of the parties and without necessity, should not allow or order the interruption of the evidence.

ARTICLE 86.

The adduction of evidence should not, unless for good reasons in the discretion of the judges, be adjourned, even by consent of parties, before it has commenced, or whilst the parties are proceeding therewith, on account of the absence of one or more witnesses, if other witnesses are before the Court.

ARTICLE 87.

The examination of the witnesses present, must be had, saving to the parties the right of producing the absent witnesses, and upon the order of the Court, which, after inquiring into the facts which the party intends to prove by these absent witnesses, and taking into consideration their probability, their pertinence to and effect upon the suit, grants or refuses such order.

ARTICLE 88.

The Court may, at any time, even after the hearing upon the merits, and the setting down of the

case upon the advisement roll, revoke the order made, refusing the right to produce additional witnesses, and allow or order the rejected depositions to be produced, and upon these new depositions, allow others.

ARTICLE 89.

It is also discretionary with the Court to order the appearance of any witness offered or not by the party, if the proof shows that such witness probably knows some fact pertinent to the suit or necessary to clear some point and place the Court in a position to render justice to the parties, and it may delay the closing of the proof, until the examination of such witness.

ARTICLE 90.

Upon the production of any witness, examined by order or under the permission of the Court, the adverse party may, if the Court deems it expedient, obtain leave to produce other witnesses, either to attack the credibility of or to contradict the witness, or for both purposes at once.

ARTICLE 91.

If, by reason of the press of business or the presumed length of the proof, the judges deem it advisable, they may appoint one or more Commissioners

under the form prescribed by the Code of Civil Procedure, before whom the evidence will be adduced, but only on the days upon which the Court is sitting, and who shall decide upon the objections to the evidence, saving the parties' right of appealing from the decision of the Commissioners to the first division then sitting, which shall hear the objections and decide upon them *instanter*, so that the deposition may be continued before the Commissioner.

The county judges are, of right, Commissioners, and if the first division sits at the same time as the County Court, such evidence may be taken before that Court, if it can be done without interfering with the matters there pending.

The adduction of evidence commenced before the Court, may be continued before a Commissioner and *vice versa*.

ARTICLE 92.

No deposition taken by a Commissioner or a county judge, can be closed before being read to the witness, in presence of the Court, which may fix any time of the day suitable to it, to have the depositions of the witnesses, heard before the Commissioners, read to the witness and to close them.*

* The object of this article is to give the Court cognizance of the proof before the hearing, as in cases in which the evidence is taken before it.

ARTICLE 93.

Immediately after the proof is closed, the parties are heard upon the merits of the case.

ARTICLE 94.

A special roll, called "the advisement roll," shall be kept by the clerk, upon which shall be inscribed, in order of date, the cases taken under advisement, and the date of the judgment.

ARTICLE 95.

No case shall be entered upon the roll, without an order of the Court to that effect.

OF JUDGMENTS AND THEIR RENDERING.

ARTICLE 96.

Judgments are rendered by the majority of the Court. If the case was heard before two judges only, and they disagree, a re-hearing shall be ordered, and the case shall be heard *de novo* before three judges.

ARTICLE 97.

No case shall be entered upon the advisement-roll, before the judges have, after consultation, agreed that they cannot decide the case on the day of its hearing, or on the nearest day of the term, or within any other short delay.

When judgment is rendered, without the case being set down upon the advisement roll, it must be drawn up and signed within twenty-four hours after it is rendered.

ARTICLE 98.

When according to article 97, a case should be taken under advisement, the judges, before it is entered, shall, in a conference held by them, on the bench or in chambers, to which the attorneys of the parties may be called, and during which they may be heard to make suggestions, settle a statement of the questions of fact and law which arise in the case, commencing with the questions of fact; it is, as much as possible, in this order that the case shall be considered when under advisement and the questions decided. This settlement of the facts shall not, however, be final; it may be set aside or modified while the case is under advisement.

ARTICLE 99.

In the appreciation of the proof, the first division is not obliged to consider, as producing judicial effects upon the trial, the facts, or any of them, which its own judgment in review, or the judgment of the second division, not appealed from, has declared to be pertinent, and upon which proof has been allowed.

The first division, on the contrary, may, notwithstanding either of these judgments, consider the facts

as being without influence upon the final judgment or reject the proof as useless or illegal.

ARTICLE 100.

As much as possible, the cases shall be taken under advisement, and decided in the order of their hearing.

ARTICLE 101.

The judgments shall be so drawn as to contain a statement of the questions of fact and of law, and the decision upon these points shall be sufficiently clear, so as to give to any one, not already possessed of it, an idea of the question in litigation, and shall, if required, serve as a report of the case.

ARTICLE 102.

Every judgment shall categorically decide the questions of fact and law, whose solution is essential to the suit, commencing with the facts and shall only pass to the questions of law, if the decision on the facts does not dispose of the case.

ARTICLE 103.

All the judgments rendered after advisement shall be signed and initialed by the President of the Court, before being delivered in open Court.

Additional rules upon proof and judgments are to be found in the Code of Civil Procedure.

ARTICLE 104.

All the Articles respecting procedure, the contestation, the articulation of facts, hearing and judgment upon the objections before the second division, the proof and hearing and the judgment before the first, apply to all contested cases before the Superior Court, subject to ordinary procedure.

SUMMARY PROCEDURE.

All contested cases, and all contentious proceedings before or after judgment, do not, however, fall within this category. There are some which, by reason of their urgency, the smallness of the amount in litigation, and the delay which they cause in the proper decision of cases, must be withdrawn from the jurisdiction of the first division, and tried and decided in an exceptional manner by the second division, with or without an appeal to the first.

The procedure followed in these special cases, contrary to the general rule, which gives jurisdiction to the first division over the merits of all contested cases, is the summary procedure, other rules for which shall be given hereafter, subject to modification in certain cases.

Before doing so, it is fitting to give the names of the ordinary cases and those accompanied by provisional proceedings considered as summary, which will be subject to the jurisdiction of the second division. These are:

1. Actions for alimony, based on the law or on contracts, except those accompanied by conclusions in declaration of paternity, in which, however, the second division may order provisional allowances;

2. Cases arising from the relations of landlord and tenant, lessors and lessees, with or without provisional measures;

3. The revendication of movables whose value does not exceed the amount of the ultimate jurisdiction ;

4. Actions for salaries of persons hired at a fixed price, for a determined time, or by the piece, or by the day, laborers, artisans, domestic servants, clerks in banks or stores, tutors, school-teachers and professors, or other employees, furnishing in similar circumstances their material or intellectual labor to others ;

5. Actions by hotel or boarding house-keepers for lodging, maintenance, board, or provisions supplied by the day, week, month or year.

6. Actions based on promissory notes, bills of exchange, drafts, cheques, notes of hand, obligations, either authentic or by private writings, accounts for supplying goods and merchandise or movable effects whatsoever, and acknowledgments of debt ;

7. Suits against corporations irregularly formed, or against those that have violated or exceeded their powers ;

8. Suits respecting the usurpation of public or municipal offices ;

9. Mandamus ;

10. Suits in the nature of prohibition or injunction ;

11. Suits in the nature of *scire facias* or suits to annul Letters-Patent ;

12. Hypothecary proceedings against immovables whose proprietors are absent or unknown ;

13. Suits to procure the discharge from hypothecs, or ratification of title ;

14. Suits to dismiss from tutorship, curatorship and all demands in revision of orders made by judges on the advice of a family council, in cases where there is an appeal from such orders.

The enumeration of cases contained in paragraphs 1 to 6 does not cover the whole of these cases but it only deter-

mines the nature of these paragraphs, in the category of which similar cases should fall.

Upon any question raised before either division, as to the jurisdiction of either over these cases, the judge who shall decide that a party has brought his case in the wrong jurisdiction, shall not for that reason dismiss the demand, but shall send the case before its proper tribunal.

Similarly the complaint of any party, that either upon the summons or in the proceedings preliminary to trial, and upon all judicial proceedings, he has only had summary delays in place of ordinary delays, shall not give occasion to the dismissal of the demand or the loss of the right summarily claimed, or to the setting aside of the proceeding by which the other party claims it, but simply to an extension of the delay for the period which he has been deprived.

A party summoned in the ordinary form, who should have been summoned in the summary manner, may demand the dismissal of the action and *vice versa*.

Incidental proceedings, either before or after judgment, also considered summary, and which remain before the second division, are:

1. Preliminary exceptions;
2. Recusations;
3. Disavowals;
4. Continuance of suits;
5. Petitions in revocation of judgment;
6. Interventions;
7. Oppositions by third parties;
8. Oppositions to annul;
9. Oppositions to withdraw;
10. Oppositions to secure charges;
11. Oppositions for payment and contestations of reports of distribution;
12. Suits to set aside a sheriff's sale;

13. Contestations of provisional measures.

Oppositions to marriage, which is included in neither of these two categories, is another summary matter.

In all these summary cases above enumerated, the parties may, before or after the adduction of evidence, or when the case is ready for hearing on the merits, inscribe it by consent upon the law-roll of the first division, where the proof shall be taken and the case heard and decided as in ordinary cases. In any similar stage of the case, the second division may, if overcrowded with business, order the clerk to inscribe it upon the proof and hearing roll, or the law-roll of the first division, where it shall be fixed, tried, pleaded, and decided according to the rules of that division of the court.

The parties may also, after the pleadings, by producing, upon the day after the issue has been joined, a joint declaration to that effect, proceed by articulations of fact, according to the method prescribed by Article 82, and following.

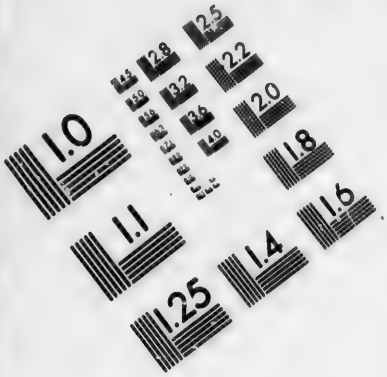
The delay of four days fixed by that Article to produce the articulations, shall be reckoned from the day after the production of such declaration.

ARTICLE 105.

Except in cases where special provisions are applicable to particular cases, the summary procedure before the second division shall be the following:

ARTICLE 106.

The delays upon summons shall be five days, whatever may be the distance of the place of service from the Court.



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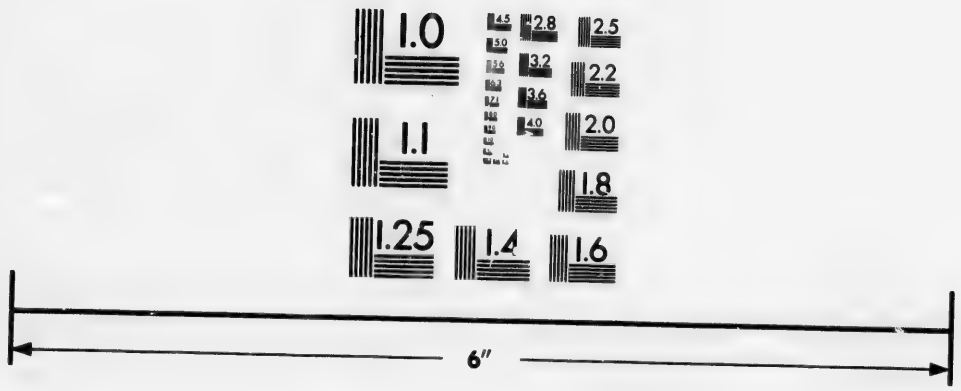

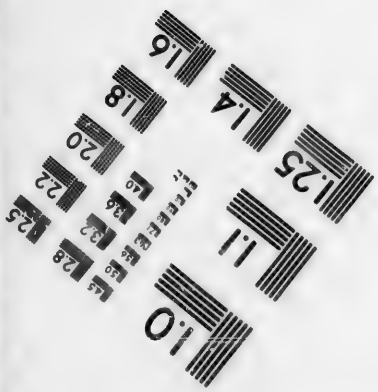

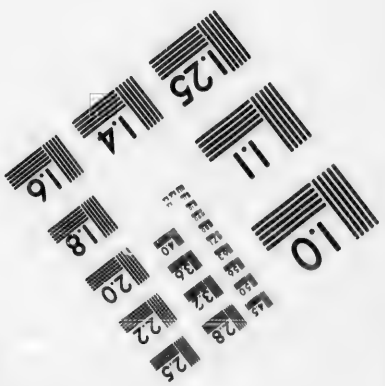

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ARTICLE 107.

The delay to produce preliminary exceptions shall be one clear day, and three days to plead to the merits.

ARTICLE 108.

There shall be only one clear day between each pleading required to join the issue.

ARTICLE 109.

In the case of preliminary exceptions, the plea to the merits shall be produced within the three days from that on which such exception shall have been disposed of.

ARTICLE 110.

The application of the above five Articles shall be made *mutatis mutandis* according to the rules given in the articles above, respecting summons, preliminary exceptions and contestation.

ARTICLE 111.

Except in the above mentioned case of the consent of the parties, there shall be no articulation of facts in summary matters.

ARTICLE 112.

Every juridical day of the judicial year shall be a day for the adduction of evidence in the second division,

in whose jurisdiction are summary matters, including the cases of urgency to be spoken of hereafter. Proof shall be taken before the second division, sitting the Court, in contested cases, according to the forms given in the Code of Civil Procedure.

ARTICLE 113.

There is only one roll in the second division, called the proof and hearing roll, for contested cases, and another roll, called the default-roll.

ARTICLE 114.

The witnesses are examined before the Court, and a summary or notes of their evidence are taken by the judge or at his dictation. The hearing on the merits immediately follow the closing of the proof.

ARTICLE 115.

Special provisions for the matters enumerated in the second category of summary cases, are to be found in the Code.

PROCEDURE IN CASES OF URGENCY.

There are among the summary matters, some suits and some incidents that require a still prompter procedure, on account of the special favor due to the demand, or the excessive delay which the incident occasions to the trial of the case, and which require shorter delays. For these reasons, the necessity of an *urgent* procedure is specially

obvious. We give the name of *cases of urgency* to those special matters which will form a division of the summary procedure, which will remain applicable to those cases that are not excepted. These cases will retain their generic name of *summary cases*. The procedure of urgency will apply to all suits and instances so noted in the new Code.

This procedure shall be the following:

ARTICLE 116.

The delay between the service and the return is one day, if the service is made within a radius of fifteen leagues from the Court, with an additional delay of one day for every fifteen leagues, or portion of fifteen leagues, of additional distance.

ARTICLE 117.

The defendant is obliged to appear and plead in the forenoon of the second day which follows the expiry of the delay upon the summons, and if he does not do so, he is proceeded against by default to appear or to plead.

ARTICLE 118.

Issue is joined in the manner prescribed in the above articles, for ordinary cases, except that the pleadings necessary to join it are produced from day to day, and in the forenoon of the day upon which they are to be produced.

Every preliminary exception is to be produced at the same time as the plea to the merits.

Proceedings on preliminary pleas and those to the merits are had together, and if the preliminary exception is maintained, the plaintiff is condemned to pay the costs of the whole suit.

ARTICLE 121.

So soon as the issue is joined, the case may be inscribed before the second division, upon the roll for proof and hearing for the next day, and the proof shall be taken and continue from day to day, and when closed, the case shall, without delay, be heard upon the merits.

ARTICLE 122.

The evidence shall be taken in writing, unless the parties consent to oral testimony.

ARTICLE 123.

The judgment in these matters shall, if possible, be rendered at once, or on the day following the hearing.

ARTICLE 124.

If the urgent matter did not commence as a provisional proceeding accompanying the summons, but is an incident in the case, the proceedings necessary to bring the matter to judgment shall, unless there be special provision or derogation, continue from day to day, and the judgment, as in the case of the

preceding article, shall, if possible, be rendered on the day of the hearing upon the merits, or on the following day.

The division of the summary jurisdiction into two classes of cases is already to be found in the Code of Civil Procedure, although not so distinctly characterized. Two examples of this division are found in the different procedure followed in two summary matters, suits between lessors and lessees, authorized by the first chapter of the second title of the sixth book, in which the delay upon summons is one day, with an additional delay of one day for five leagues distance, and in which the contestation is carried on from day to day, and the suits respecting corporations and public offices, in which the delay upon summons is three days, with the same additional delay, and the delay to produce pleadings is three days. The Commission has taken as a distinguishing line between the purely summary procedure and procedure of urgency, the distinction between the procedure upon actions between lessors and lessees, and that respecting corporations and the usurpation of public offices, making of the first the model or prototype of the urgent procedure, and of the second that of the purely summary procedure.

In the Code of Civil Procedure will be seen what summary matters, principal or incidental, should be treated as purely summary or as urgent. It suffices at present to state that every summary matter, included in either of the two categories above mentioned, and which is not declared to be subject to procedure of urgency, remains subject to the summary procedure. The same rule applies to matters not declared to be summary, which are tried and decided according to the ordinary procedure.

Among summary matters subject to urgent procedure,

naturally come suits between lessors and lessees, which have served as the model thereof.

There are, however, other cases which deserve equal, if not greater favor; these are alimentary actions, and we include therein all those brought for the price of material or intellectual work furnished by the employee, under any title whatsoever, to procure necessaries for himself. So that all actions mentioned in Nos. 1 to 4 of the first category are of this number, and the urgent procedure applies to them.

All the other cases submitted to this procedure will be seen in the Code.

The formal recognition of the summary procedure, in connection with one of the divisions of the jurisdiction, is a feature of the New Code, so far unknown to our judicature laws, in which this procedure, as we have already stated, now exists only in its application to some particular matters, but not as a distinct organization. In the present system, the summary procedure is only an accident, and figures only as exceptional, in place of being the subject of a general rule, and holding a distinct place in the order of the matters included in it. This was an omission to supply, and a blank to fill.

It is evident that summary matters should fall within the sphere of the powers of the second division held by one judge, in distinction from ordinary matters decided by the first division, held by three judges, subject to a more complete mechanism and a structure more perfect, but less simple and expeditious. Despatch being a necessary condition of this procedure, the matters to which it is applicable should be terminated sooner than the ordinary cases.

It will be perhaps found, owing to the large number of matters treated as summary, that they take up too large a

place beside ordinary matters, with respect to which they are exceptions only, and that the result of its too extensive application would be that in certain jurisdictions (that of Montreal for example) the second division, to which the time of one judge alone is assigned, would have too much to do as compared with the first division, which is held in two sections and by three judges in each.

The Commission has foreseen this objection and removed it to a certain extent by allowing, as above enacted, the second division, overburdened with work, to send to the first division a certain number of cases which it thinks would not suffer by this transfer, and the parties themselves to transfer summary cases to the first division.

There is another reason besides the number of cases before the second division, which might give rise to this double provision. There are, among the summary cases, some in which, from the nature of the demand, say an account for supplies, a draft, bill of exchange, notarial obligation, and the character of the contestation, questions may arise which take away from the suit its summary character, and require its reference to the ordinary procedure or to the first division.

This latter case is also provided for by the permission given the parties, who are the best judges of the importance of their cases, to transfer, by consent and without exception, all their summary cases to the first division.

The Commission think they should here suggest a third rule. That is, to allow the reference to the first division, of cases in which the contestation has so changed their nature, to be there tried as ordinary cases and according to the same forms, the articulation included, upon the application of any of the parties, and in the discretion of the court. This application should be made on the day after issue is joined, or two days after, and if allowed, the delay for the

articulation shall be reckoned only from the day after the judgment allowing it.

This third rule would, in addition, have the effect of relieving the second division from the matters so referred to the first. There is another method of reducing the excessive amount of business before the second division. It would be, not to make absolute and without exception the rule requiring the holding in permanence of the first division at Montreal, in two sections, and to allow the second division to sit in two, three or four sections, each presided over by one of the judges, which the suspension of this rule would leave free. Everything is left discretionary with the Court, but the advocate-general is obliged to take the initiative therein.

The same power should be left, in the district of Quebec, to the judges, to hold several sections of the second division, and to suspend the sittings of the first division, when the necessities of the public service permit it.

In the case in which the second division may transfer, before or after proof, a case to the first division, the judge holding such second division, in place of ordering the transfer, should have the power to require the assistance of one or more of the other judges; the proof should be taken before these judges and the judgment be pronounced by them.

The appeal to the first division, from judgments rendered by the second, shall be taken in the cases in which it is allowed, by simple declaration to that effect, made at the time the judgment is rendered or within four days following its rendering, with notice, in the latter case, of one clear day, given to the other party.

This appeal cannot be taken from judgments rendered by several judges.

Certain judgments in urgent cases (judgments ordering

provisional or definitive alimentary allowances, for example), shall be executed, notwithstanding the appeal.

Special provisions will be found in the Code of Procedure, respecting the security and other conditions under which this appeal is exercised. That is a matter of detail which has no place here.

It would be desirable, that in the beginning of the judicial year, which lasts from the first of September to the tenth of July following, the interval being filled by the summer or long vacation, that the distribution of the judges of Montreal should be so made, that the presence of the same judges in both sections of the first division and in the second division, should be assured for the whole year. However, this rule would not be absolute, and, according to the requirements of the service and the convenience of the Courts, the inversion of the order would be optional, and any judge would sit in either section of the same division; the two divisions might sit in one or several sections, on the same day, and divide their sittings as they please, on condition always, however, that the second division should sit during the whole judicial year, and even during the vacation, for certain cases set forth in the Code, among which will be found the urgent cases.

It is to be noted that for the purposes of the appeal to be hereafter spoken of, a sitting of the second division, held by several judges, in summary cases, shall be considered as a sitting of the first division.

III.

Of the excessive formalism of the Code of Civil Procedure, and the means of remedying it.

We now reach the third obstacle to the good administration of justice which has been above alluded to. Examples

of the excessive formalism of our laws are found all through the Code of Procedure, and we will point them out as they appear, so as to remedy them and do away with this abuse and exaggeration of the form. These amendments will be found throughout the draft of the new Code of Procedure. We may be here allowed to note several articles taken from the draft, in which we will again replace them, to show its general tenor, by isolated examples taken here and there, without regard to the order of the subjects to which the articles refer, and without a connection between them.*

ARTICLE 125.

GENERAL RULES OF PROCEDURE.

The trial and judgment of cases is had in the forms given by the Code. However, in default of prescribed forms and in omitted cases, the Courts may, and it is even their duty to dictate to the parties or sanction the forms used by them, which they deem necessary or efficient to validly try cases, give a solid foundation to their judgments and insure their execution.

ARTICLE 126.

The style of procedure is not confined to any technicality or form of words. Every pleading shall be concise, drawn in simple, clear and intelligible terms, distinctly enumerate the grounds and object of the demand, and the written language of the

* The order of the number of these articles, is not that given them in the Code.

Court shall, in so far as the particular character of the subject permits, be conformable to ordinary language and be interpreted in good faith, without cavil, and in a sense conformable to the apparent intention and interest of the parties.

ARTICLE 127.

Errors of calculation, of drafting, and all faults of caligraphy, when apparent, are corrected by the Courts themselves, in addition to the parties being also allowed to rectify them on a written or verbal demand to that effect, with or without notice to the other party, in the discretion of the Court, and according as the parties suffer or not by such default of written demand or notice.

ARTICLE 128.

Defects in form involve nullity only when this penalty is formally pronounced by some article of the Code.

ARTICLE 129.

In every other case, the nullity is within the discretion of the Courts, whose judgment upon the matter is not subject to appeal, and it should be pronounced only when the violation of the prescribed form causes to the party invoking such nullity, an irreparable injury. Otherwise, and if the error is not one of those which, according to Article 127,

they may of themselves amend, it shall be always lawful to the party who, either personally or by the executive officers whom he has employed, has made a mistake in the form, to amend it and repair such defect in his proceedings.

ARTICLE 130.

Except in cases of absolute nullity, no objection to the form, raised without a substantial grievance by any party, shall be favorably received by the Court.

ARTICLE 131.

All judicial matters are not necessarily, although they may be validly, dealt with and decided in open Court.

ARTICLE 132.

By consent of parties, the cases for hearing before the Court may, in urgent cases, based on public interest or the private interest of the parties, whose importance the judge shall determine, be heard in Chambers, in the residence of the judge, or in any public or private place, provided that the judgment, if not rendered at once, or on the day following the hearing, be rendered in open Court in the ordinary way, and that in the former case it be, without delay, enregistered in the office of the Court where the case is pending.

ARTICLE 133.

If, at the opening or at any period of the term, there is not at the *chef-lieu*, owing to some accident, a suitable Court-house in which to hold the sittings of the Court, such sittings may be lawfully held in any building chosen for that purpose by the judge, by an order entered in the register. All writs of summons shall be returned in the place thus temporarily set apart for the holding of the Court, defaults shall be there recorded, and all proceedings taken with the same effect as if in the ordinary Court-house.

ARTICLE 134.

In cases in which this Code or any other law has no express provisions applicable to questions of procedure raised before the Courts, they shall search among analogous cases for the rules of their decisions. In the absence of such analogy, the rules must be sought for in the general spirit of our judicial organization and of our laws of procedure, and in the common law, and in default of all these, they shall be based on common sense.

ARTICLE 135.

No right shall be without recourse before the Courts, and in case the Code of Procedure does not give forms for the exercise of such right, the judges shall prescribe such forms or favorably receive those suggested by the parties, if they find them efficient.

ARTICLE 136.

No technical error in the form of any proceeding, unless such form is expressly prescribed, shall cause the rejection of the proceeding adopted, motion, petition or plea, or any other form of procedure; provided that it is not substantially contrary to judicial usage and the formalities essential to the suit.

ARTICLE 137.

The words "Tribunal," "Court" or "Judge," applied to the judges in the exercise of their jurisdiction, are synonymous.

GENERAL POWERS OF THE COURTS.

ARTICLE 138.

Outside of and in addition to the cases permitted by law or the rules of practice, every Court has the power to swear persons heard before it or acting under its authority. It also has the same power to require that every act within its jurisdiction shall be performed under the sanction of that solemnity.

ARTICLE 139.

In the investigation of disputed facts, the judge may, in addition to the proof adduced by the parties, endeavor to arrive at a clear understanding of the matter, by using any means requisite to ascertain the truth.

ARTICLE 140.

He may cite before the Court, and compel, under the penalties of the law, to appear and testify before him, all persons whom he may think are in a position to enlighten him upon the pretentions of the parties, whatever may be their rank and position, scientists, public officers, or private individuals, provided always that this article shall not affect privileged cases.

If the suit turns upon the verification of writings or special and technical matters, respecting the arts, sciences, professions, trades and industries, the Courts may order inspections, operations and valuations to be made by scientific men and those skilled in and cognizant of the matter.

ARTICLE 141.

The greatest latitude is given to the Courts in this respect, and their judgments are not subject to appeal on these points.

They shall not, however, have recourse to these special methods, except in cases of necessity, and in the ascertained absence of means of discovering the truth and of rendering justice to the parties by means of regular proof made by them, in the course of ordinary procedure.

WHO MAY PLEAD AND BE IMPLEADED IN THEIR OWN NAMES AND HOW MUST THOSE WHO ARE INCAPACITATED DO SO.*

ARTICLE 142.

By observing the rules of the competence of the Courts, every foreigner as well as every British subject, wherever his residence or domicile, may, if he is otherwise lawfully qualified, appear in his own name before the Courts of the Province, both as plaintiff and defendant, against any foreigner as well as any British subject, and against any inhabitant of the Province.

He may sue and be sued before these Courts.

ARTICLE 143.

To be in a position to appear before the Courts, in his own name, and without any outside authorization or intervention, it is necessary (except in the cases hereinafter mentioned, in which minority is not an obstacle to the exercise of this right) that he be of full age, have the use of his reason, and the free exercise of his civil rights and the disposal of his property, and not be under any legal incapacity.

* The articles from article 142 to article 163, which are only a reproduction of the common law, have been inserted in the draft of the Code, for the purpose both of establishing the sense of uncertain jurisprudence upon several conditions required to validate the appearance, in their own names, of certain incapacitated persons and for the better understanding of articles 164, 165 and 166, which provide a radical reform upon the matter, by changing into relative and reparable, those nullities which arise from the non-observance of these conditions, hitherto considered absolute and irreparable.

ARTICLE 144.

It is necessary that he should have an interest in the suit. Such interest, except in special cases where it is otherwise provided, need not be actually existing; it may be only eventual.

ARTICLE 145.

Married women, minors, interdicted persons, and those who are civilly dead, cannot plead or be impleaded, except in the following cases:

ARTICLE 146.

A wife, being a public trader, does not require the consent or presence of her husband to take proceedings before the Courts, in connection with her business.

ARTICLE 147.

A married woman, separated as to property, or who, not being separated as to property, has by her contract of marriage reserved the enjoyment and management of her property, may alone and without the assistance and authorization of her husband or of the Court, appear in her own name and formulate all demands, and set up all defenses necessary for its administration and preservation. She takes alone, in her own name, the personal actions belonging to her. Further, a married

woman does not require the authorization of her husband or of the Court to institute, in the case provided for by sections 96 and 97 of the Quebec License Law of 1878, an action of damages against a person licensed for the sale of intoxicating liquor, who, notwithstanding the prohibition made under section 95 of the same law, sells such liquors to her husband. The same applies to the action of a married woman against any person, resulting from an offence.

ARTICLE 148.

In all other cases, no married woman can appear in her own name without being authorized by her husband, present in the case, or by the Court.

ARTICLE 149.

A minor, emancipated by marriage, may appear in his own name and institute all suits and personal actions respecting the administration, preservation, and enjoyment of his property.

ARTICLE 150.

An unemancipated minor, being a trader, who, for the purposes of his business, is reputed to be of full age, may institute all real and personal actions relating to such business.

ARTICLE 151.

For all suits outside such business, he is considered as an ordinary minor.

ARTICLE 152.

An emancipated minor cannot institute any real action without the assistance of a curator to his property or one appointed *ad hoc*, and without the authority of justice.

ARTICLE 153.

With the exception of the above-mentioned cases, an emancipated minor can no more appear than an unemancipated minor.

ARTICLE 154.

An unemancipated minor cannot appear in his own name. His ordinary tutor or tutor *ad hoc* alone can appear for him and in his name.

ARTICLE 155.

To institute a real action for a minor, the tutor, however, should be duly authorized, upon the action of a family council.

ARTICLE 156.

A person interdicted for insanity or prodigality cannot appear in his own name. His curator must act for him, in his quality as such.

ARTICLE 157.

A person to whom a judicial adviser has been appointed cannot act without the assistance of such adviser.

ARTICLE 158.

No real action can be brought by a curator in the name of an interdicted person, or by the interdicted person himself, without the assistance of his curator, and without being previously duly authorized upon the advice of a family council.

ARTICLE 159.

A person civilly dead cannot appear in any suit except to claim necessaries.

ARTICLE 160.

Corporations cannot appear except under their corporate name, recognized by law or usage, or given them by their charter, or the title creating them.

ARTICLE 161.

No suit respecting a substitution or the property composing it can be received unless a curator appointed to such substitution be party to the suit, in addition to the other necessary persons.

ARTICLE 162.

There is no right of action against a person who is civilly dead.

ARTICLE 163.

As to the other persons above mentioned who are incapacitated, that is to say: married women, minors, interdicted persons, and corporations, they cannot be summoned before the Courts, except in the forms, qualities and conditions set forth in the above articles, and every omission, if not remedied, shall be a bar to the action which is affected thereby.

ARTICLE 164.

Such bar, however, is not always absolute, and any amendment, made between the institution of the action and the final judgment, if no plea in bar is produced, and up to judgment upon such plea in the second case, has, saving the adjudication left discretionary with the Court as to the costs of the incident, the effect of rendering the suit valid in the following cases:

ARTICLE 165.

1. If a married woman, separated or not common as to property, but who has the administration of her property, institutes a real action, or a married woman not common as to property, but who has not the administration of her property, institutes a personal action;
2. If a minor, emancipated by marriage, institutes a similar real action, or, if being emancipated by law, he institutes a personal action without the assistance of his curator;

3. If an emancipated minor, assisted by his tutor for real actions, institutes a similar action without judicial authorization;
4. If a person interdicted for prodigality institutes a personal action without being assisted by his curator;
5. If a curator to a person interdicted for insanity or prodigality institutes a real action without judicial authority;
6. If, in any case, the incapacitated persons above mentioned, or their representatives, requiring judicial authorization to institute an action, institute such actions without such authorization;
7. If, under similar circumstances, real or personal actions are instituted against such married women, minors, interdicted persons, tutors and curators.

In each of these cases, it is lawful for the husband to intervene in the suit and ratify the actions of his wife, and the tutor and curator, those of the minor and of the interdicted person, for the past, and to continue them in the future, and the authorization, in cases where it has not been obtained before, may be obtained after the institution of the action.

This Article applies *mutatis mutandis* to the case in which a suit is brought against any incapacitated person.

ARTICLE 166.

In the case of a corporation improperly described, the rectification of the error may be made with the

permission of the Court, upon simple notice served upon the opposite party.

DIVERS PROVISIONS.

ARTICLE 167.

Upon proof made by affidavit or otherwise, to the satisfaction of a judge, that a party, who has apparently a good right to exercise in justice, either as plaintiff or defendant, is unable to make the necessary disbursements, such party may be authorized to plead *in forma pauperis*, and the officers of justice are, under such authorization, obliged gratuitously to perform their several duties for such party, to assist him in establishing such right. This Article applies to the costs of proof, to bailiffs and witnesses.

ARTICLE 168.

The preceding article does not apply to penal actions. Neither does it apply to those other suits which, however well founded in law, may seem to the judges to be vexatious or animated with a desire to damage the adverse party.

ARTICLE 169.

Such authorization, which upon proof that justice has been deceived, or that the party was, when it was given, in possession of, or has since acquired, sufficient property to allow him to make such

disbursements, may be revoked, has not however the effect of preventing the party being condemned to costs in favor of the adverse party, in case he becomes liable thereto.

ARTICLE 170.

It is to the officers of justice, and not to the party pleading *in forma pauperis*, that the adverse party who succumbs as to the costs, shall be condemned to pay the fees for services so performed. And an execution therefor may be issued in their favor. The same rule applies to the witnesses.

ARTICLE 171.

Only one execution shall, however, be issued for the joint benefit of [illegible] officers and witnesses for the amount due to each, and each will be paid his claim out of the moneys levied under such execution, after such moneys have been deposited in the clerk's office.

ARTICLE 172.

In a suit for personal damages resulting from an offence, if the plaintiff is insolvent and the Court believes the suit vexatious, it may compel the defendant to give security *judicatum solvi*.

ARTICLE 173.

In all legislative provisions or legal proceedings, unless the text is opposed to such interpreta-

tion, by the word "plaintiffs" is meant all parties instituting any suit or formulating any demand whatever, either principal or incidental, and raising an issue thereon under whatever form; and by the word "defendants," any party to the suit who contests such conclusions and pleads to such demand.

ARTICLE 174.

Every proceeding is susceptible of being amended in any stage of the case, even after the hearing and whilst under advisement, and, upon special application, the case may be struck for that purpose, if the Court finds such amendment necessary to render justice to the party and to repair an error or an omission committed by him, his attorneys and advocates, and the executive officers; saving any adjudication respecting new pleadings, whether written or oral, and with reference to costs, which are in the discretion of the Court, which shall make use thereof to preserve the interests of the other party and prevent him from suffering from the amendment so allowed.

ARTICLE 175.

At the time of the hearing on the merits, any party may produce, in writing, new conclusions which have been communicated to the other party, which are not opposed to the conclusions already taken

by such party, are not incompatible with the matter in litigation and are necessary to render justice to the party taking them.

ARTICLE 176.

Provided that the parties impliedly make application in their pleadings, declarations, pleas or other proceedings, and the proof justifies it, the Court may annul, rescind, or set aside any deed or contract, without formal conclusions to that effect being taken.

ARTICLE 176½.

The default to join in the case any party whose presence is necessary to render any legal proceeding valid, does not give rise to nullity, but may be amended.

CHAPTER SECOND.

DIVISION OF THE PROVINCE INTO TWO JURISDICTIONS, APPOINTMENT OF A SECOND CHIEF-JUSTICE, AN ADVOCATE-GENERAL AND ASSISTANT JUDGES.

The Commission have, so far, reviewed the defects in our judicial system noted in the report which serves as a preface to its work, particularly those in connection with the Superior Court, and has suggested under each head the method they think suitable to remedy them. There remain to be indicated the several changes to be made in the organization

of this Court, and in the working of the Court of Appeals. The constitution of the County Court, substituted to the Circuit Court, will then be considered.

It is, however, proper, before coming to this County Court and to the Court of Appeals, in view whereof, as well as of the Superior Court, the division of the Province into two jurisdictions, the creation of the office of Advocate-General, and the choice of assistant judges (*juges-suppléants*, among the members of the bar, have been proposed, to give a more ample explanation of the object of these measures and the means of carrying them out, in order to derive therefrom all the advantages expected by the Commission.

As already stated, the division of the Province into two jurisdictions forms already a part of our judicial system, but, so far, this division has been confined to the two jurisdictions of the Court of Appeals; it is foreign to the Superior Court.

At the head of this latter Court is the Chief Justice of the Province, who, in addition to the judicial powers of an ordinary judge in the district in which he resides, is clothed with an administrative power, that of choosing among the judiciary of which he is the chief, after consultation with his colleagues, assistant judges for the Court of Appeals, and of filling, by the members of the Superior Court, the blanks created in the various sections of that Court, by the accidental incapacity of their ordinary judges.

We have seen what an increase of work is given to this officer who resides at Quebec, by the duty of appointing assistant judges for the Court of Appeals, sitting both at Montreal and Quebec, and the obligation of keeping complete the Courts of the districts within the jurisdiction of Montreal, for the purposes of appeal. He is forcibly compelled to depend upon the judges of Montreal, and especially upon the assistance of the senior judge of that

Court to divide with him this duty, apparently slight, but in reality onerous. He would be much more overburdened under the proposed system, under which the assistant judges for the Court of Appeals, taken from the members of the bar, shall be named for each appellate jurisdiction by the superior judges of that jurisdiction; those of Quebec to be appointed by the judges of the Quebec jurisdiction, and those of Montreal by the judges of the Montreal jurisdiction. Such nominations for each jurisdiction are to be made in conferences of the judges of the Superior Court, at which the Advocate-General and batonniers of the jurisdiction shall attend, to be held in each of the cities of Quebec and Montreal. A fixed number of assistant judges so appointed will form a permanent body, to be gradually renewed as each of the members retire. It is also by the judicial authority, assisted by the Advocate-General, that special appointments of substitutes shall be made in each case.

The fixing of the terms in the districts shall be made in similar conferences. Under these circumstances, would it not be simpler, owing to the inconveniences arising from the journeys which these duties would entail upon the chief justice of the Province, to appoint a chief justice for the jurisdiction in which the former does not reside, at the same time allowing the present incumbent to retain his pre-eminence, title and honors? Is it not also just that the judiciary should have a representative in the jurisdiction not favored by the residence of the chief justice of the province?

The formation, among the members of the bar, of a body of assistant judges, amongst whom, in all probability, the ranks of the judiciary will be recruited, can, on the other hand, only tend to raise the level of the legal profession, increase the idea of its dignity, by inspiring its members

with a legitimate ambition, and give to the public a guarantee of good judges, in the person of the assistant judges, whose transitory functions will have served as a prelude to permanent ones and their temporary presence upon the bench, will be a reason for their remaining there. The choice of these assistants made by the Bench, the Advocate-General, the batonniers, and, in default of batonniers, by the senior advocates of the circuits and not by the government or by the sections of the bar, whose elections are not always free from intrigue, would also be withdrawn from political influence, and would offer to professional worth, the inducement of a well-deserved reward. It would be, doubtless, from among the older members of the bar, at least from amongst the most prominent advocates, that this choice would be made, but this distinction would, nevertheless, not cease to be a motive of just emulation for the younger ones.

Open to every merit, this honor should also be open to all the sections of the bar, and this is one of the points upon which is specially based the bill prepared by the Commission (one of the objects whereof is to raise the judicial and professional level of the new to an equality with those of the old districts). The assistant judges are to be chosen, therefore, among all the sections of the bar indistinctly, and, as much as possible, without mathematical precision however, in the new districts, in the proportion that the total number of eligible advocates in the circuits of each jurisdiction bears to the members of the sections of the bar of each of the districts of Quebec and Montreal, having the same qualification.

Notwithstanding the excellence of these reasons, they are not the sole motives for the suggestion made by the Commission.

The principal reasons which prompted the selection of

assistant judges from among the advocates, was the impossibility of continuing to take them from the Bench of the Superior Court. We have already stated that the new subdivision of the judicial service will require the continued presence of the judges of the rural districts, at their *chefs-lieux*, and the multiplicity of business will prevent the judges of Quebec and Montreal from performing that duty. The raising of the quorum of the Court of Appeals, from four to five judges, which will be proposed by the Commission, when the reforms to be made in this Court will be discussed, will, on the other hand, render more numerous the causes of the incompetence of these judges, and require more frequently the services of the judges of the Superior Court, and will increase the inconvenience resulting from their removal.

The causes for recusing assistant judges, will naturally be the same as those of ordinary judges. The law respecting them takes on this point, precautions to prevent the appointment of incompetent assistant judges, and to remove, not the danger, which is not feared, but the suspicion, of any partiality on their part.

The same law gives in detail the reasons for the creation of the office of Advocate-General. As to the salary of this officer, it provides that it shall, at no time, exceed the amount of the fees now paid to the advocates of the Crown, when they represent it in cases to which the Advocate-General will in future attend. A provision which will prevent the imposing of any additional burden upon the public treasury.

The two following Acts, prepared by the Commission, complete the suggestions set forth in the course of this work upon the division of the province into two jurisdictions, the appointment of a second chief justice, and of an Advocate-General and assistant judges.

An Act to divide, for judicial purposes, the Province of Quebec into two jurisdictions, and to appoint a second Chief Justice of the Superior Court.

Whereas, by article 1117 of the Code of Civil Procedure, it is enacted that "proceedings in error or appeal from judgments rendered in the districts of Montreal, Ottawa, Terrebonne, Joliette, Richelieu, St. Francis, Bedford, St. Hyacinthe, Iberville and Beauharnois are brought, heard and determined fn the City of Montreal, and the writ is made returnable there, and the like proceedings against judgments rendered in the districts of Quebec, Three Rivers, Saguenay, Chicoutimi, Gaspé, Rimouski, Kamouraska, Montmagny, Beauce and Arthabaska, are brought, heard and determined in the City of Quebec, and the writ is made returnable there."

Whereas, by the laws at present in force, the appointment of assistant judges for both jurisdictions of the Court of Appeals, and for the Superior Court in the whole province, in case of the accidental incompetence or incapacity of the ordinary judges of both Courts, falls within the privileges of the chief justice of the Superior Court alone;

Whereas, this duty, which extends over the whole province, imposes an excessive supervision upon that officer, and the extent of the sphere within which it is exercised, renders its fulfilment difficult;

Whereas, by reason of both these inconveniences, it is expedient to divide this duty between the chief justice and another judge of the Superior Court, and for that purpose, and for several others set forth in the new laws, it would be expedient to formally recognize the above mentioned division of the province into two jurisdictions, to limit the responsibility of the chief justice to the appointment of assistant judges for the Court of Appeals and for the

Superior Court, sitting within the sphere of the jurisdiction of Quebec, and to invest another judge with similar responsibility, in regard to the Court of Appeals, held at Montreal, and the different courts of the Superior Court, within the limits of the jurisdiction of Montreal;

Therefore, Her Majesty, by and with the advice and consent of the Legislature of Quebec, enacts as follows:

1. The province of Quebec is, for the purposes of the Superior Court, as well as for the Court of Appeals, divided into two grand divisions or jurisdictions, the first called the jurisdiction of Quebec, composed of the districts of Quebec, Three Rivers, Saguenay, Chicoutimi, Gaspé, Rimouski, Kamouraska, Montmagny, Beauce and Arthabaska; and the second, composed of the districts of Montreal, Ottawa, Terrebonne, Joliette, Richelieu, St. Francis, Bedford, St. Hyacinthe, Iberville and Beauharnois, will be called the jurisdiction of Montreal.

2. For the purposes of the formation of these jurisdictions, the tribunals of the Superior Court and the judges appointed thereto, shall belong to the jurisdiction within the limits whereof their districts are situated.

3. The City of Quebec shall be the *chef-lieu* of the jurisdiction of Quebec, and the City of Montreal that of the jurisdiction of Montreal.

4. The chief justice of the province, whose office, with its titles, rank, privileges and prerogatives is continued, shall preside over the jurisdiction in which he resides, and, so long as he shall continue to reside in the City of Quebec, he shall preside over the jurisdiction of Quebec.

5. The Lieutenant-Governor of the Province shall appoint one of the judges residing at the *chef-lieu* of the other jurisdiction, to be the President thereof, and he shall be called the Chief Justice of that jurisdiction. So long as the

Chief Justice of the Province shall be the President of the Quebec jurisdiction, the President of the Montreal jurisdiction shall be called the Chief Justice of Montreal, and, *vice versa*, if the Chief Justice of the Province becomes the President of the Montreal jurisdiction, the other Chief Justice shall be called the Chief Justice of Quebec.

6. The Chief Justice of the Province, or the first Chief Justice shall preside over the conferences of the judges of the jurisdiction over which he presides, as well as the conferences of the judges of both jurisdictions united; the second Chief Justice shall preside over the conferences of his jurisdiction, and those of both jurisdictions united, in the absence of the first.

7. The objects of these conferences are stated in the Act creating the office of Advocate-General, in the laws of judicial reorganization and in the Code of Civil Procedure.

8. Each Chief Justice shall, in his jurisdiction, see to the appointment of assistant judges for the Superior Court and for the Court of Appeals, and to the replacing of judges who are incompetent or unable to sit in the Superior Court, by other judges of the same Court, and shall, in addition to his duties as an ordinary judge of the Superior Court, perform the administrative duties imposed upon him, as well by this Act as by the laws just mentioned.

An Act to create the office of Advocate-General.

Whereas, by reason of the political functions exercised by the Crown law officers of the Province, to wit: the Attorney-General and the Solicitor-General, which occupy all their time and prevent them from attending to the juridical duties of their office, it has become impossible for them to represent the Crown before the civil and criminal courts of the Province, as well as to immediately superintend

the administration of justice, and whereas the fact of these officers not taking part in judicial matters has resulted in the reprehensive practice of employing private advocates to represent the Government before all the Courts of the Province, without subordination among themselves and without any special responsibility on the part of any of them towards the Crown and the public, all of which tends to create confusion in the administration of justice, and to considerably increase the cost thereof;

Whereas also, since Confederation, there have arisen, and still arise daily before the Courts, in suits between private individuals, questions of legislative conflict between the Federal Parliament and Provincial Legislatures, and more especially that of this Province, without there being any legal means of permitting the Government to intervene and defend the legislative prerogatives and the rights of the Province, thus constituting an omission which is prejudicial to the public interest;

Whereas, in fine, it has become urgent that these inconveniences be removed, by establishing, with such modifications and such increase in the powers and duties necessary to adapt it to the new requirements and present position of the Province, the office of Advocate-General, similar to that which heretofore existed in the Province of Lower Canada before the Union of the Provinces of Upper and Lower Canada, and which fell into disuse under subsequent regimes;

Therefore, Her Majesty, by and with the advice and consent of the Legislature of Quebec, enacts as follows:

1. The office of Advocate-General is hereby established, with the functions, duties, powers, prerogatives and salary, hereinafter mentioned.

2. Such Advocate-General shall be appointed by the Lieutenant-Governor in Council, and be selected from amongst the Queen's Counsel of this Province, and his Commission shall be issued under the Great Seal of the Province.

3. The following are the functions, powers, duties and prerogatives of the Advocate-General :

1. He superintends the administration of justice and the carrying out of the judicature acts ; he informs the Attorney-General of the errors and infringements of discipline committed by judicial functionaries and officers of justice of every rank and position, performing their duties before the Courts, and suggests such reforms as are calculated to suppress such infringements, to secure the proper working of the Courts and improve the judicial system ;

2. He sees that the Courts of original jurisdiction and of appeal are regularly held, and that assistant judges (*juges-suppléants*) are appointed to replace the judges who are unable to sit in such Courts ;

3. He sees to the maintenance of judicial dignity and to the preservation of the franchises, privileges and prerogatives of the Bench and Bar ;

4. He represents the Crown in criminal cases ;

5. He intervenes, before the Supreme Court, as hereinafter set forth, and before the Civil Courts of the Province, of any jurisdiction whatsoever, in all cases between private individuals, in which any question may be raised as to the constitutionality of any Act of this Province or of the Federal Parliament, and takes all necessary proceedings in connection therewith ;

6. Finally, he convenes, in both of the jurisdictions of Quebec and Montreal, the conferences of the judges, of batonniers of the bar, and of advocates, ordered by the

laws respecting judicial organization and by the Code of Civil Procedure :

a. To fix the terms of the Superior Court in the various districts.

b. To make the appointments of assistant judges, selected from amongst the advocates, to replace judges who are unable to sit in the Courts of Original Jurisdiction and of Appeal;

c. To make rules of practice and tariffs of fees for advocates and executive officers, before the Superior Court;

d. To carry out all the other provisions enacted by the Laws of Judicial Organization, the Code of Civil Procedure, and any other law. And, at all these meetings, he is the promoter of all the proceedings and sees to the carrying out of all the objects of the meeting;

4. In order to give effect to the foregoing sections of this Act, it is also further enacted as follows:

The Attorney-General shall, from time to time, assign to the Advocate-General the Courts before which he shall personally appear for the Crown and represent the Government, and he will entrust individual advocates, selected on the recommendation of the Advocate-General, with this duty before the Courts of Criminal Jurisdiction, where the Advocate-General will not himself appear.

5. These advocates or representatives of the Advocate-General, shall be under the superintendence, authority and control of that officer.

6. Fifteen days, at least, before the date fixed for the usual holding of a term of the Court of Queen's Bench, Crown side, the clerk of the Crown in all the rural districts shall forward to the Advocate-General the charges, complaints and informations lodged in his office, the evidence

and documents showing the proceedings thereon, and after examining such documents, the Advocate-General shall decide whether it be expedient that such term be held, and shall report his decision to the Attorney-General, and thereupon the latter officer shall give the necessary instructions to the Sheriff to summon the jurors, whenever it is deemed expedient that a term be held.

7. The Advocate-General shall also decide, in every case, whether an indictment or information shall or shall not be submitted to the grand jury on behalf of the Crown; he shall notify the clerk of the Crown thereof, and his decision shall be acted upon.

8. It shall be the duty of the Advocate-General, whenever it may be necessary, to confer with his substitutes, the Sheriffs, clerks of the Crown and all other officers of justice, as to the most effective method of administering justice in criminal matters within their respective districts, and of holding terms therein, and it shall be lawful for each of such officers, at all times, to obtain, without fee, from the Advocate-General, his opinion and every information they may deem requisite on any point connected with the duties of their respective offices, and with the administration of justice in criminal matters within their districts.

9. On the other hand, it shall be the duty of these officers to obey the lawful orders and commands of the Advocate-General in all criminal matters within the limits of their functions.

10. No account of a substitute for fees or emoluments, or of a sheriff for costs of summoning, taxation of witnesses and other similar disbursements, shall be paid or recognized by the Government, unless they are previously examined and approved by the Advocate-General

11. It shall be lawful for the Advocate-General, from time to time, to revise, amend and remake existing tariffs, or make new ones for costs of summoning jurors and witnesses, taxation of the latter, determine the cases and establish the conditions (without, however, contravening the laws in force on the subject) in which such witnesses shall receive compensation for the costs of their evidence; determine the salaries and emoluments of the substitutes and other officers of justice, settle all matters, effect all necessary reforms in order, while protecting the efficiency of the public service, to establish a wise economy and judicious retrenchment in the administration of justice in criminal matters.

12. No question as to the constitutionality of any Act of the Province or of the Federal Parliament, shall be raised before the Courts of Original Jurisdiction or of Appeal, unless the party raising the same, shows to the Court that he has, at least three days before the hearing, given notice to the Advocate-General of the question which he intends to raise, with sufficient information to enable him to understand the nature of his pretensions, and, upon such notice, the Advocate-General shall intervene in the case, on behalf of the Crown, and take issue, in writing, on such questions, and the judgment of the Court, whether it grant or refuse his conclusions, shall mention such intervention and such conclusions, on which it shall render judgment, as if the Advocate-General were a party to the suit.

13. When the Federal Parliament shall have passed an Act, or when the Supreme Court shall have made a rule of practice, authorizing the Advocate-General to intervene before the Supreme Court on behalf of the Province, in any case in which a question of such a nature as that mentioned in the preceding section shall be raised, it shall also be the

duty of the Advocate-General to intervene therein on behalf of the Province, and take such similar conclusions as he may deem proper.

14. No complaint against an advocate shall be tried by a council of a section of the bar, unless it has been previously submitted, with the documents in support thereof, to the Advocate-General; and, in any action before the said council against such Advocate on any such complaint, it shall be lawful for the said Advocate-General to become a party to the suit, in his official capacity, and to take issue for or against the complaint, as he may think proper, and the judgment on the complaint shall mention his intervention, and the issue he has taken, whether the judgment supports the same or not.

15. The Advocate-General shall represent the Crown in all civil cases of any jurisdiction in which the Province is a party or is interested.

16. During the interval between the issue of the proclamation fixing the date at which the laws of judicial reorganization and that relating to the Code of Civil Procedure shall come into force, and the date of their so coming into force, the Advocate-General shall prepare:

1. A draft of regulations or rules of practice for the Superior Court, applicable to all the Courts in the districts which compose it;

2. A tariff of fees, salaries and emolument of advocates and attorneys, and of the executive officers, the determining of which, under existing laws, is not within the province of the executive council;

3. A table for each of the jurisdictions of Quebec and Montreal, of the terms of the first division in each of the districts composing the same;

4. Two tables of the assistant judges (*juges-suppléants*) for the Superior Court and the Court of Appeals, one for the jurisdiction of Quebec and the other for that of Montreal, selected in each jurisdiction and without distinction, in all the sections of the bar, of the districts which compose it, from amongst the Queen's Counsel, the members of the General Council and the Councils of sections of the Bar, and the Advocates having the requisite number of years of practice, to qualify them to be judges of such Court.

The number of assistant judges shall be twelve for the jurisdiction of Montreal and six for that of Quebec.

17. After having prepared such draft of the rules of practice, table of the terms of the first division for the districts in each jurisdiction, table of assistant judges and tariff of advocates, attorneys and executive officers, the Advocate-General shall convene a conference at Quebec, of all the judicial body of the Province, to which will be called all the Judges of the Superior Court, batonniers of the general council, and of councils of sections, and, in the circuits in which no batonnier resides, the senior Queen's Counsel, and, in default of Queen's Counsel, the senior practising advocate of the circuit.

18. He shall also convene another conference at Montreal, of the judicial body of that jurisdiction, to which will be called the judges batonniers, Queen's Counsel, and the senior advocates of the jurisdiction of Montreal, who are entitled to be invited to the general conference at Quebec.

The same notice convening the persons invited to such conferences shall serve for both, and, with each notice, the Advocate-General shall forward a copy of the rules of practice, of the tariff, of the tables of terms, and of the assistant-judges, which he has prepared.

19. The general conference held at Quebec, which will be attended by all the judges of the Superior Court for the whole Province, the batonniers, Queen's Counsel and senior advocates above mentioned, and the Advocate-General, who shall be the promoter of all the proceedings and deliberations, shall be presided over by the Chief Justice of the Province.

20 At such general conference, at which the batonniers, Queen's Counsel, senior advocates, and Advocate-General shall be entitled only to express their opinion, the rules of practice and the tariff applicable to the whole Province shall alone be taken into consideration, and if they are adopted, with or without amendment, by a number of judges forming the majority of all judges of the Province, they shall become law.

21. The object of the general conference being attained by the adoption of the tariff and of the rules of practice for the whole Province, the judges, batonniers, Queen's Counsel and senior advocates of the jurisdiction of Montreal shall withdraw; but the Advocate-General shall remain, and the general conference shall then become a special conference for the jurisdiction of Quebec.

22. In this special conference, over which the chief justice of the province shall continue to preside, and which shall be composed of the judges, batonniers, Queen's Counsel and senior advocates of the jurisdiction of Quebec, and at which the Advocate-General shall continue to act as the promoter of all the proceedings and deliberations, the latter shall produce the tables of terms and of assistant judges, which he shall have prepared for the jurisdiction of Quebec, and, at the same time, lay before the conference a list of all the members of the councils of sections, the Queen's Counsel and the advocates within the jurisdiction, having

ten years practice, who are eligible as assistant judges, and whose names are not already entered on the table so prepared by him.

Amongst the persons inscribed on the table and the lists, the six who shall obtain the greatest number of votes from the members of the conference, shall be appointed assistant judges.

The tables of the terms of the first division, for the whole jurisdiction, shall then be taken into consideration, and shall come into force, with or without amendment, if they be adopted by the number of judges, forming a majority of all the judges of the jurisdiction. In the absence of the chief justice of the Province, the chief justice of Montreal shall preside over the two conferences in Quebec.

23. At the conference in Montreal, which shall be composed of the judges, batonniers, Queen's Counsel and senior advocates of the jurisdiction, presided over by the chief justice of Montreal, and held in accordance with the rules above prescribed, at which the proceedings and deliberations shall be the same as at the special conference for the jurisdiction of Quebec, and at which the Advocate-General shall also produce, with his table, a list of all the members of the councils, of sections, the Queen's Counsel and the Advocates, having ten years practice, who are eligible as assistant judges for the jurisdiction of Montreal, and whose names are not already inscribed on the table prepared by him; the twelve persons inscribed on such table and on such list, who shall obtain the greatest number of votes from the members of the conference, shall be appointed assistant judges. The table of terms proposed by the Advocate General for the districts comprised within the jurisdiction shall then be taken into consideration and shall become law if it be adopted, with or without amend-

ment, by two-thirds of the judges present, composing the majority of the judges within the jurisdiction.

24. If, at any of the above mentioned conferences, the rules of practice, the tariff and tables of terms do not receive the assent of the judges present in the number required, such rules of practice, tariff and tables of terms and of assistant judges, prepared by the Advocate-General, shall come into force.

25. It shall be the duty of the Advocate-General to forward to the executive council a duplicate of such rules of practice, tariff, tables of terms and of assistant judges which have so come into force for each jurisdiction, and another duplicate to each clerk of the Superior Court for the Province, and such Advocate-General shall also cause such rules of practice, tariff and tables to be entered in the registers and posted up in the office of each Court, and the minute of the enregistration shall contain a statement thereof.

26. On receipt of such rules of practice, tariff and tables, the Government shall issue a proclamation declaring them to be in force, on the same day that the laws respecting judicial reorganization and the Code of Civil Procedure shall come into force.

27. Before effecting the registration and posting up of the table of assistant judges, the Advocate-General shall nevertheless notify each of them of his appointment, requesting him to accept the office, and every assistant judge refusing the same shall be replaced by the Chief Justice of the jurisdiction for which he was named, with the concurrence of the Advocate-General, by another advocate having the qualification required by sub-section 4 of section 16 of this act, for filling this office, and the registration and

posting up of the table shall be effected only when the requisite number of assistant judges shall have signified their acceptance.

28. Whenever the services of an assistant judge are required in a case in appeal and in the Superior Court, in either jurisdiction, the clerk shall give notice thereof to the Advocate-General.

29. Within the three days preceding each term of the Court of Appeals the clerk shall submit to the judges the list of cases inscribed on the roll of the Court and each judge shall notify him of his inability to sit in any of such cases.

30. The clerk shall add to this list all the cases inscribed during these three days and, in each of such cases, the judge who is incompetent to sit shall make the above declaration as also during the term, when new cases are inscribed.

31. On the day previous to or on the first day of the term, the clerk shall send to the advocate-general the list of such declarations of inability to sit, and so on during the term, as new cases are inscribed and further declarations of inability are made.

32. The advocate-general shall notify the chief justice of the jurisdiction of such declarations and both shall at once proceed, in the presence of the clerk of the Superior Court, to appoint assistant judges to replace the judges who are incompetent to sit in appeal.

33. This appointment shall be made in the manner indicated in the following provisions.

34. After enregistration in the registers of the Superior Court for the districts of Quebec and Montreal, the clerk of each of such courts shall make a list of the assistant judges, indicated by lot, by means of numbers from one up to that representing their number.

He shall prepare counters, of suitable material and dimensions, equal to the number of assistant judges, and shall cause one of the numbers on the list to be written or engraved on each; he shall also procure two boxes, marked No. 1 and No. 2, of proper dimensions, with a lock and key, and in the cover of each shall be made an opening, sufficiently large to allow of the introduction of such counters.

35. He shall then appear before the chief justice of the jurisdiction, in presence of the advocate-general and he shall there produce the two boxes and the list, a duplicate of which he shall have caused to be made for keeping in the archives of the Court. In box No. 1 shall be placed the numbered counters; No. 2 shall remain empty; the boxes shall be locked and remain in a special place in the office under the charge of the prothonotary, who shall be the custodian thereof and who shall allow no one, except his deputies, and then only in case of necessity, to have access thereto, and the keys, with the other duplicate of the list, shall remain in the possession of the Chief Justice, who shall be the custodian thereof.

36. When it becomes necessary to make a selection of assistant judges, the prothonotary shall go before the Chief Justice, to whom, in the presence of the Advocate-General, who shall appear in person in the district in which he resides, and be represented in the other districts by the Sheriff, he shall deliver the two boxes and exhibit the list of assistant judges in his possession. The box No. 1 shall be opened, and as many counters drawn by lot as there are assistant judges to be appointed, those to whose names the numbers on the counters withdrawn from the box shall correspond on the lists, when confronted, shall be the nominees, and shall act as assistant judges in

the cases indicated. Opposite the name of each of such assistant judges corresponding to one of the numbers withdrawn from the box, the list shall mention the date of the appointment and the case for which it was made. The numbers withdrawn from box No. 1 shall be placed in box No. 2, which shall remain locked, and the same process be gone through for each subsequent appointment until box No. 1 is emptied, and then the counters with which box No. 2 was filled from No. 1, shall be replaced in the latter.

37. This replacing shall be done gradually and in the same manner as the counters were taken from box No. 1 to be placed in No. 2, and the same process shall be continued for each appointment until the box is emptied, in which are placed the counters taken from box No. 1, and the operation shall be continued indefinitely.

38. It shall be the duty of the Advocate-General to see that the number of assistant judges is maintained at that required by sub-section 4 of section 16 herinabove, and to see to its being renewed as hereinafter set forth.

39. When a vacancy occurs amongst the assistant judges by death, elevation to the bench, resignation, ceasing to practice, or from any other lawful cause, his successor, taken from the lists mentioned in sub-section 4 of section 16, shall be appointed by the chief justice of the jurisdiction and by the Advocate-General.

40. After his appointment, the name of the new assistant judge shall be entered on the list in place of that of his predecessor, whose number he will bear, and, in the subsequent ballots, when the counter bearing this number shall be withdrawn from the box, the newly elected assistant judge shall act as such, in the same manner as his predecessor would have done, if he had remained in office.

41. Immediately after the election of an assistant judge, the Advocate-General shall notify him of his appointment, by letter or by telegraph, if he belongs to the bar of another district than that in which the Advocate-General resides, and if the assistant judge appointed be not incompetent or debarred from acting, and if he be not prevented by any other inability, he shall accept the appointment, and at once, on receipt of the letter or telegram, notify the Advocate-General of his acceptance.

42. Every assistant judge, who, in addition to the legal reasons which might render him incompetent or recusable in the case, if he were an ordinary judge, might have a moral or pecuniary interest, or might have an advantage to gain or damages to avoid, by favoring one of the parties, shall not be competent, and shall declare the same to the Advocate-General, while refusing the office of assistant judge. If he accepts, he declares the opposite.

43. When for any reason whatsoever, an assistant judge does not accept such appointment, he shall likewise notify the Advocate-General who, upon such refusal or after a resonable delay has elapsed without any answer being received, and under any other circumstance rendering acceptance improbable, shall make provision for the replacing of such assistant judge and he shall act in like manner for the second or any other nomination which is not accepted.

44. Immediately on being notified of the acceptance, the Advocate-General shall give notice of the appointment to the clerk of the Court for which the same has been made, and the latter shall inform the assistant-judge of the day on which his services will be required.

45. The assistant-judge, the Chief Justice, the Advocate-

General, the clerks of both Courts, as well as the ministers of the Crown shall not reveal the appointment of the assistant judge, who shall not be known before he assists at the hearing of the case for which he is named.

46. The assistant judges shall, as set forth in section 42, be subject to the same recusations and the same causes therefor, in addition to that mentioned in the said section, as ordinary judges, and a party who declares that he has reasons to allege with reference to the incompetence and the recusation of an assistant judge, may obtain delay to do so and for that purpose demand that the case be continued.

47. Upon such statement of the party, as well as upon the recusation, the assistant judge shall make a declaration as to the facts relating to such statement, according to the knowledge he has of them, and even if such facts do not constitute legal inability, he may abstain from sitting if the Court think proper and another assistant judge shall be appointed in his stead.*

48. In the event of a recusation being filed, it shall be decided as ordinary recusations, but the proceedings shall be continued from day to day, and the ordinary judges, who are not incompetent, shall decide the same.

49. The assistant judges shall, in virtue of the present Act, have the same powers as the judges of the Superior Court, appointed assistant judges under the laws now in force.

50. If, owing to absence, illness or any other impediment, a judge of Appeal, should, at any period of the year, become

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* In this case there would be an exception to the rule which forbids the judge to withdraw.

incapable of performing his duties and after the Chief Justice of the Court of Appeal or the senior puisné judge (if the Chief Justice be incapable of acting) and the Advocate-General have conferred together and are of opinion that, owing to the circumstances and the probable duration of such inability, it is in the interest of the judicial service that a substitute be appointed in the place and stead of such judge, on their joint report to that effect to the Chief Justice of the Superior Court, one of the assistant-judges shall be appointed, by ballot, in the jurisdiction in which the judge, who is unable to act, resides, in the manner set forth in sections 35 and 36, as if for the appointment of an ordinary assistant judge, to replace the judge in Appeal, while the inability of the other judge lasts. The latter shall give notice to the Chief Justice and to the assistant judge, as soon as his inability ceases, and thereupon the powers of the assistant judge shall cease.

If, however, the assistant judge is, at the time, seized of some case under advisement, his powers, in connection with such case, shall continue until it be disposed of.

While acting as such, the assistant judge shall have all the powers, competence, prerogatives, appointments and privileges of an ordinary judge of the Court of Appeals.

51. The assistant judges shall also act as assistant judges (*juges-assistants*) of the Court of Appeals in special terms, on the conditions and in the manner set forth in that part of this draft which relates to the Court of Appeals.

52. It shall be the duty of the Advocate-General to see that assistant judges are appointed, from among the judges of the Superior Court in the event of the ordinary judges being incompetent, or in the event of a division of opinion according to Article 96 of the new Code, and if the judges of the Superior Court cannot, without disturbing the work-

ing of the Courts and preventing their being regularly held, be selected from amongst the ordinary judges, such substitute shall be selected from amongst the assistant judges, by the Advocate-General and the Chief Justice, in the manner above set forth.

53. The annual salary of the Advocate-General shall not exceed the average amount of the fees paid yearly, during the five years previous to his appointment, to the advocates charged with the duty of representing the Crown before the Courts before which the Advocate-General shall himself represent it.

REMARKS UPON THE TWO PRECEDING ACTS.

These Acts present, in their application, matters of principle and of detail, of which we must treat separately in our remarks upon them.

The organic principles of these acts are to be found in the provisions which relate to the division of the Province into two jurisdictions, the creation of the office of Advocate-General, and the appointment of assistant judges (*juges-suppléants*) from amongst the members of the bar.

To the objects already specified, and which necessitate the holding of conferences by the judges, and the exercise of special powers by each Chief Justice within his jurisdiction, others may be added in time, which it would be difficult to enumerate now, but which it is not impossible to foresee, however vague may be their foreshadowing.

Hitherto the judges have studiously refrained from approaching the Legislature in connection with legal reforms, which their representations would have so powerfully contributed to effect, and have left to the bar the duty of obtaining them. And yet it would seem to be the duty of the Bench to enlighten the Government as to the

insufficiency of the Judicature Acts, and as to the obstacles which their defects oppose to the proper working of the Courts, and there is nothing which so impedes the progress of jurisprudence as the prejudice which denies to that body the opportunity of giving the benefit of its experience to judicial legislation, and of taking an interest in legal matters, in any other way than by judging them, and which forbids it to throw the light of its counsels upon their improvement. Surely it is not by so beneficial an interference that any violation of the principle of complete separation of the legislative and judicial powers would occur.

To the remonstrances of the old Parliaments, France was indebted for its best laws, and, in the conferences of its judges, the forms of its judicial legislation, at various periods, found birth. The perfection of the French Codes is, in a great measure, due to the observations of the highest tribunals.

Moreover, our own laws are not opposed to the spirit of these precedents, which they have even imitated. Did not the act which decreed the Codification of our Civil Laws and of our procedure, order the judges to participate, by their remarks, in the work of the Commissioners and to advise them? Their having refrained from doing so on so important an occasion, was a very regrettable fact, from which the merit of our Codes and especially that of the Code of Procedure, has seriously suffered.

The House of Assembly, on the recommendation of the Commission, created last session from amongst its own members, a standing Committee on Legislation, one of whose duties is to reform the judicial system, and to find means of improving it. What is there to prevent this Committee from asking the co-operation of the Bench of each jurisdiction, which, in the conferences convened by the Advocate-General, as we have shown above, and com-

posed of the judges and of the bar, represented by the batonniers and Queen's Counsel, would enlighten it with its knowledge and assist it with its experience? And how many similar occasions may not arise in the future, in which such conferences would be beneficial?

The enforced residence of the judges of the circuit at the *chef-lieu* of their district, has occasioned the choice of assistant judges (*juges-suppléants*) from amongst the members of the bar.

To the motive brought forward in support of this innovation, objection may be taken, that in many circuit districts there is not sufficient business to give constant occupation to the judges, that there are even some in which the insignificant number of suits hardly occupies one-fourth of their time. This may be true, but it is equally true that, neither in establishing a judicial system, nor in any other matter of public interest, can we be guided by exceptions, and that the rule fixing quarterly or less frequent terms in such districts, even if its application would not be as suitable in some jurisdictions as in others, must be extended to all. Now, as the sittings of the Court of Appeals, which, as will be seen hereafter, will be required, as well as the Superior Court, to sit permanently, must necessarily coincide with those of the latter tribunal, how can we, without interrupting or suppressing them, compel the judges who hold them, to sit in a strange Court?

On the other hand, is it quite true that, under the new system, the office of judge, even in the jurisdictions which are the least troubled with business, will be a sinecure?

On this point the want is felt of a reform which has not yet been suggested: the abolition of the judicial power now enjoyed by the prothonotaries and notaries in non-contentious proceedings, such as family councils, as well as the jurisdiction in contentious proceedings vested in the

prothonotaries alone, for certain urgent matters, and the restoring of such power to the judge of the Court. In principle there is no distinction, as regards competence, between jurisdiction in contentious and that in non-contentious proceedings. Both are derived from the same power, and it is only the magistrate clothed with the right to judge and to whom the judicial authority is delegated, who is vested with it.

Owing to the scarcity of judges, the law conferred upon prothonotaries, at a now distant period, a portion of this power, but the time has now come when, owing to the judges being sufficiently numerous for the requirements of both jurisdictions, it has become necessary to revoke this dismemberment of judicial authority and this derogation from the laws of competence which have given rise to abuses and imperilled the civil status of persons laboring under disabilities, who are placed under the safe-guard of the law and the protection of the Courts, assisted by the advice of their relatives. These persons are minors, the insane, absentees and all others deprived of the exercise of their civil rights.

What is more important for the protection of families and of those who are interested in these acts, than the appointment of tutors, the sale of property belonging to minors, the interdiction of the insane and of prodigals, curatorships to absentees, and so on for all the acts of non-contentious jurisdiction performed every day by notaries and clerks, without examination, without any knowledge of the subject and with a sham observance of the strict and solemn formalities required by law in such cases. Family councils in this country have become a mere parody on justice, if indeed, since they have been removed from the supervision of the judges alone, they have ever been anything else.

The laws require, on pain of nullity, that the family

council be composed of the nearest relatives of the parties laboring under disabilities, and it is only when it is proved that no such relatives exist, or, if they do, that they have been duly summoned, that they may be replaced by what it has become the custom to call the *friends* of the family.*

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* There is a very common abuse which has crept, in almost all the jurisdictions of the country, into the composition of family councils and which we consider our duty to point out here. In appointing curators to absentees, to interdicted persons, in general or special tutorships to minors, in authorizing the sale of their property or in other proceedings which require the advice of relatives, it is customary to bring to the family councils as *friends*, persons who not only are not on friendly or intimate terms with the absentee, the person to be interdicted or their relatives, conditions which are indispensably necessary to justify their taking part in the meeting, *amicos appellare debebus non levi notitiâ conjunctos, sed quibus fuerint jura cum patre-familias honestis familiaritatis quæsita rationibus;* (D. L. 50. T. 16) but also total strangers who have no interest whatever in the minors and absentees and who, in most cases, tender the advice they have been instructed beforehand to give. The minutes of the proceedings of the family council call them *friends*, and by weakness or indifference the judges and prothonotaries homologate the proceedings.

It is by this means that a bad custom may sanction tutorships damaging to the minors, expose them to lose their property and give rise to an improper interference in the administration of the property of absentees.

397. To obviate this, the officer to whom is confided the duty of taking the advice of the relatives, should carefully inquire into the filiation of the absentees and minors, as well as of the other persons on whose behalf the family council is convened and their degree of relationship; ascertain the number of relatives living and their residence and whether they are in the neighborhood; see that the nearest relatives in each line and in their default that the next relatives in both lines or in one of them, as the case may be, are present or have been summoned and not accept relatives from an outside district unless there are not sufficient relatives residing in the district in which the appointment is made.

398. As to the friends, in the event of there not being a sufficient number of relatives and connections, they should not be admitted to form part of the family council except when they possess all the requirements above set forth and when they have a sufficient knowledge of the reasons for which the council is convened to enable them to give proper advice; all of which the officer can ascertain by questioning the relatives, the persons composing the family council and those who have applied for it, and by all such other means as he may see fit to have recourse to.

Whenever the composition of the council appears to him to be defective or at variance with the above-cited articles of the Code, and that it does not possess

If the records of the Courts be consulted, it will be seen that more than one-half of these councils are composed, to a greater or less extent, and often entirely, of friends in default of relatives; and who are these friends? Most frequently they are strangers who not only have never been on friendly terms with the family of the incapacitated persons or the persons themselves, but who are even ignorant of their names and of their existence, people who are obliging enough to give an opinion dictated to them at the suggestion of interested parties, and who do not in the slightest degree weigh the consequences which result from the opinion they give, and which they very frequently do not even know. And all this is done on oath! How many minors may be ruined, absentees robbed, and estates despoiled by this fatal indifference displ. yed in the appointment of dishonest curators and unfaithful tutors, and how many other abuses would have been prevented by the presence of the judge, if he had presided over the the family council, regulated its proceedings, and recognized as valid only those which had been held according to law?

The restoration to the district judges of the right to exercise their functions in these matters, while showing the disadvantage of removing them from their jurisdiction, will be an additional proof of the necessity of the assistant judges, whose appointment we have suggested.

The number of these assistant judges has been fixed at twelve for Montreal and six for Quebec, but this number is discretionary, and may be increased or reduced. Once the

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the above conditions required to make it effective, he should order a new council to be convened. As the family council relates to very weighty interests it is equally important for such interests that the letter of the law with respect to the composition and convening of the council be followed. The slightest deviation therefrom may be productive of great evil.—(Translated from *Commentaires sur le code civil du Bas-Canada*, vol. 1, p. 305.)

principle is admitted, it may be made to apply to all cases; there is nothing theoretical in it. On the contrary, it is made to suit the special requirements of each jurisdiction.

The last of the Acts to which our remarks refer, assigns to the general conference the duty of preparing the tariff of advocates' fees, but this tariff is not an absolute necessity. The former tariff may perhaps be sufficient under the new system. If not, and if a new tariff should become necessary for the working of the new procedure, it will, nevertheless, be necessary to see that the simplifying of the forms of procedure do not affect the tariff now in force, and an express proviso to that effect would be necessary.

We denounced law costs as one of the abuses of the judicial system, but we must make an exception with respect to advocates' fees, which are far from being too high, and are, perhaps, not proportionate to the earnings of other classes of society, notwithstanding the assertion of public prejudice to the contrary, which we have no hesitation in calling both false and unjust. The Commission is not afraid of being accused of being true to its caste on this subject. The independence of its work, with respect to all the classes affected by the reforms which it suggests, is a sufficient guarantee of its impartiality.

It is in the advocate's bill of costs that all the costs of the suit are taxed, the advocate collects them, and the unlucky suitor who pays them is naturally inclined to believe that the person who receives them, gets all the benefit therefrom. And still there is nothing more unfair than this heedless error into which the public has fallen, and which is sanctioned by incurable prejudices. Let ten, fifteen, twenty, any number of bills be examined and it will be found that, in the majority of cases, hardly one-half the amount taxed belongs to the advocate. Where does the remainder go? To pay the disbursements and especially to pay the costs of the evi-

dence. The latter, that is, the taxation of the witnesses, which is the greatest abuse of all, the heavy disbursements and the cost of printing in the Court of Appeals, the tax which weighs upon the district of Montreal, for the building of a Court House, which has long since been paid for, and more especially the losses and expenses entailed upon suitors by the delays in the proceedings and the postponement of cases, the unnecessary costs, we mean, are the real source of the evil, and to that must the remedy be applied.*

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* To do away with the abuse caused by the cost of evidence the commission has drafted a bill, which will be published in the appendix.

The salaries of the executive officers, such as sheriffs and prothonotaries in the districts are not too high, and to reduce them would under the present system be equivalent to abolishing the office. But the system itself is defective and requires a radical change. The substitution of stamp-paper, made obligatory for all judicial documents, in the place of the payment in money of the executive officers' fees, would in the opinion of the commission, which is now occupied in drafting a bill on the subject, be a very judicious change. The stamped-paper tax, a very light and almost imperceptible one, devoted in part to the payment of the fixed salaries payable to these officers would enable a considerable reduction to be made in their fees and emoluments in each case.

We might add that by extending this tax, for the general purposes of the revenue, to all deeds and all contracts, it would advantageously replace several other taxes which are more apparent and less profitable, but this remark is not applicable here.

CHAPTER THIRD.

SUMMARY JUSTICE.

COMMISSIONERS' COURT.—COUNTY COURT.

We have established the conditions of summary procedure before the ordinary tribunals, and especially before the Superior Court. The question was to apply to certain matters before this Court, distinguished from the others by requiring a more simple and prompt procedure, the procedure in use before the summary jurisdiction, considered as a special jurisdiction, distinct from the ordinary jurisdiction. It is this summary jurisdiction that is now to be considered, when we speak of the Commissioners' Court, and the County Court.

Ever since its creation, the Commissioners' Court has always been considered in theory as a summary court. It is so named. But there is a vast difference between the theory and the practice, and in the hands of legal gentlemen who introduced into it their technicalities and litigious forms, it has in truth lost its primitive simplicity. From being as it were a domestic or family tribunal, which it ought to be, it has become an ordinary court of justice.

The Commission, in the first pages of this work, proposed to retain this court; not, however, such as it has become, but such as instituted and as it ought to have remained. It is, in fact, and rightly so, a court of equity which the Commission wishes to retain, and in that sense will, further on, propose certain changes.

The County Court, which is to replace the Circuit Court, will be a court of summary jurisdiction and of last resort.

Summary jurisdiction is that which, as a general rule, does not require technical forms. Excepting the summons and judgment, which should contain the substantial forms of suits, the other proceedings are not subject to any formalities whose non-observance would involve nullity. With the exception of this summons and judgment, the other proceedings, even the pleadings, may be oral. It is this procedure which we propose should be followed before the County Court, as more suitable to a court created to decide suits of small importance and trifling matters, in which simplicity and the needful rapidity are better served by summary forms than by the slower and more complicated progress of the regular forms.

In the draft of the new Code of Procedure, we will make the procedure of the County Court follow that of the Superior Court. We will be content, before passing to the Court of Appeals, with determining here very briefly the jurisdiction and competence of the County Court. We will discuss it at greater length later on.

As already stated, the County Court will be held wherever the Circuit Court is now or could be held, and the conditions of the establishment of the former will remain those of the latter.

The jurisdiction of the Court will be that of the Circuit Court at Quebec and at Montreal, whose competence has been reduced to $100. We must, however, be precise. The County Court shall have jurisdiction over all suits in which a sum of money, or article appreciable in money, is claimed, that does not exceed $100. So that all actions for that amount, personal, real, and mixed, will fall in that category.

When a sum of money is claimed, the amount for the jurisdiction is already established, but when it is a real right which is in question, an immovable, a servitude, the

establishing of a boundary, as the object of the action may be accurately decided upon and delivered, without the pecuniary value being in question or without such value being granted as an alternative of the judgment, and usually the valuation is not made either in the demand or in the judgment, it is not so easy to find the amount for the jurisdiction. It is, for this reason that, in general, judicature acts do not allow inferior tribunals to take cognizance of real actions, reserving them entirely for the Superior Court.

But this is only an imaginary difficulty, with which indifference is too easily satisfied, in order to increase the jurisdiction of the superior to the detriment of the inferior court. Is it not, in fact, easy, in a petitory action, to set a valuation, on the immovable claimed or value the real right or the pecuniary damage which the plaintiff will suffer by the loss of such right; let us take, for example, an *action negatoire*, the injury suffered by the person bringing it, the servitude which he wishes to be freed from, in an action to settle boundaries, the continuance of the undivided ownership, and so on in all the other cases in which the demand may be converted into a sum of money, although it may not be claimed in the conclusions, and an undetermined thing is the object of the suit. In all these cases, it would be the value which would determine the amount for the jurisdiction. If the plaintiff has increased it, he would be in the same position as one who claims before the Superior Court, a debt which he should have claimed before the inferior court, and which he increased so as to escape from his natural judges; he would suffer the penalty of such increase by being obliged to bear the additional costs occasioned by him to the other party.

If we do not have recourse to this method, we must come to the conclusion that personal actions alone can be

brought before the County Court, and that real actions, however small their interest, escape from it or perpetuate the evocation to the Superior Court. We have already seen the evil of this.

There is, however, a class of actions which, from the importance of the matter in litigation, should go to the Superior Court, these are questions of status, such as actions in separation, actions in declaration of paternity, prerogative writs, except the writ of *certiorari*, which is now within the jurisdiction of the Circuit Court; in a word, all personal actions that cannot be converted into money or are not susceptible of a pecuniary valuation.

We will see later, by whom the County Court judges should be appointed and paid, and what are their functions, when we enter into the details of the organization of the Court. It would be premature to do so before the idea itself is admitted. The outline having been sketched, we will fill it up.

From what we have stated of the summary character of the County Court, it must not be concluded that the office of the judge of the Court is of small importance and that his duties are light.

Although, from what we have stated, summary procedure may, in the terms of the law, except with respect to the summons and judgment, be oral, it is not probable, it is even unlikely, that this rapid method of proceeding will be adopted in the majority of cases. Proceedings may be oral, but will not, of necessity, be so. The party, to whom the law allows the option of proceeding without written pleadings, will probably take advantage of this permission only in cases of small value and of great simplicity, as it may, and is now, practiced in the Circuit Court, in cases which are decided *ex æquo et bono*. In other matters, the

parties will always find it to their interest to plead in writing.

Even if it were otherwise, this speedy form, in place of decreasing the difficulties of the office of judge, will increase them. It has always been noticed, that it is before the inferior tribunals, in which everything is done suddenly, where a case is caught as it were on the wing, that an advocate shows to advantage his resources and the promptness of his judgment. The same may be said of the judge. Every judge easily masters a case, written beforehand; it is only the judge endowed with a prompt judicial sense, however otherwise distinguished, who can, with ease, master an oral case, and at once seize upon its rapid phases.

It is true that the cases of $100 to $200, will be taken from the County Court, but, on the other hand, we leave to it, without the right of evocation to the higher Court, the decision of real and mixed actions, as those which affect future rights and in which revenues of the Crown are claimed.

That which, however, completes the character of great responsibility imposed upon him, is that, outside his jurisdiction as a district magistrate, the County Judge replaces the judge of the Superior Court, in matters within the jurisdiction of the second division. Although of inferior interest to those within the jurisdiction of the first division, these are of sufficient importance to require from the County Judge a more than ordinary degree of capacity, and to make of this magistracy a career sufficient to satisfy the highest ambition. The Bench too, of the higher Court, remains open to his legitimate hopes.

There will not be, as in the Province of Ontario, one judge for each county and division of a county. There will be only one judge for each district, at the *chef-lieu* of which he will reside, and whence he will proceed to

hold the court in the other counties, for a more or less considerable number of terms, according to the needs of each locality. The County Court cannot, especially in the counties outside that in which the judge resides, be held permanently, but it should hold its sessions sufficiently often to cause the delays which now paralyze the usefulness of the Circuit Court, to disappear. In the same manner as the procedure before the Superior Courts—and it is especially before a court of this nature that the benefits of a similar innovation will be felt—the procedure should be made rigorously within the delays, and no case, except under exceptional circumstances, where the impossibility of proceeding during the term would justify such a departure from the general rule, could be delayed from term to term. Every case should be decided during the term following its institution.

There is one class of matters, the burden of which the Commission proposes to remove from the County Court and to take from their cognizance, and confine to the sphere of municipal jurisdiction. These are appeals upon the merits of purely municipal affairs. It is right that in a matter which raises questions of law which cannot prudently be left to the decision of local authorities, without exposing the parties interested to judgments through favor or to party passions, and which further require a knowledge of law, the contestation of municipal elections, questions of jurisdiction and conflict between the municipal and judicial authority for example, the final decision should remain with a court of justice; but in matters of a purely municipal nature and of exclusively local interest, this court is not possessed of the special knowledge requisite to give a competent decision. These appeals are, moreover, a fruitful source of law-suits and contention.

They further attack the independence of the municipal authorities by submitting them unnecessarily to the judicial power.

CHAPTER FOURTH.

COURT OF APPEALS.

We have classed under three heads the principal defects in the administration of justice ; the tardiness of the suits, the intricacy of the forms, and the excessive costs. The Court of Appeals is not without reproach under all three heads.

On an average, cases before it last two or three years and even then are not always heard upon the merits. They are often cases brought before the higher court upon interlocutory judgments which, after being a long time pending in the court of original jurisdiction, come to make an equally long sojourn in appeal, to return before the former court, very frequently without a final decision upon the points that caused them to be taken to appeal, and even again to return there. The Commission has consequently proposed the abolition of these improper appeals.

The Commission has no hesitation in declaring that the system of terms is the chief cause of the delays in suits in appeal, more faulty even in this court than in the court of original jurisdiction, and in proposing in its stead the substitution of the permanent holding of the Court, accompanied by the compulsory proceeding in cases, as it is proposed for the court of original jurisdiction ; that is to say, by forcing the parties, under the penalty of being non-suited to terminate their cases within the required delays.

The Court will sit at Quebec, where the business is lighter during a fixed number of terms, but whose length shall be indetermin and will continue until the rolls are exhausted, with a sufficient prolongation to deliberate upon and decide the cases heard. The experience of the courts shows that in the majority of cases this prolongation will be of short duration. The judgment in extraordinary cases requiring long consideration might be adjourned either to the next term, which would be a slight inconvenience, seeing their small number, or if the parties prefer it, be rendered in Montreal.

The remainder of the judicial year would be devoted to holding the court at Montreal. This court would sit every day of the week, with the exception of one particular day, Monday or Saturday, or any other day appointed for the rendering of judgments, or the sittings might be suspended during a fixed or variable number of days, one half of the week, or one or two days, at the convenience of the Court.

Routine has such a strong hold on opinions that there is no reform, however necessary and lawful which, no matter, how slightly it may affect errors of long standing, does not at once give rise to objections. Consequently it is not without hesitation that the commission suggests this change which is the application of the principle already laid down of the permanent holding of the courts, and yet nothing can seem more appropriate than this suggestion. There is not a single person in any class of society, from the most humble to the highest sphere, who can avoid the painful but inevitable necessity of daily labor; the judges no more than others. If citizens have recourse, every day, to the courts to decide their difficulties, why should they not be held every day to pronounce upon them? the advocate pleads his cases every day and why should he not be able to find,

every day, a judge to hear them? In its relations with the other social elements, judicial action is of use only when it is not subject to any interruption, and it is only by sitting permanently that the courts can attain the object for which they were instituted. It is only by rendering immediate, one might say daily, justice that they render proper justice.

The secret of efficient justice therefore lies in its promptness and it is upon the wise application of this principle, adapted to the special requirements of each country, that the idea of the permanent holding of courts is founded. Still it is admitted that in some countries, the province of Quebec for instance, owing to the extent and number of the jurisdictions confided to the same judges, permanent sittings are not absolutely practicable; that with regard to the amount of business in most districts, it is not even necessary; therefore we have suggested that the permanent sittings of the first division of the Superior Court be held only in Montreal and Quebec. As regards the Court of Appeals it seems hardly possible that any objection can be taken to its sitting permanently, for it appears to have become necessary and indispensable for the expedition of the ever-increasing volume of business which overwhelms this Court, which is held by five judges, leaving always one available for the Criminal Courts and for the cases which are decided in Chambers.

Some people fear that, even by sitting permanently the Court of Appeals will be unable, before many years, to clear the roll of Montreal cases, if it can ever do so—so great is their accumulation. In this event the only means of avoiding this pretended impossibility, a means which would at the same time show the use of a body of assistant judges (*juges suppléants*) selected from the bar—of this we will see many other examples—would be to associate

them with the ordinary judges and make them sit in the extraordinary holdings of the Court, in two sections at once. There are six Appeal judges. Each section would be composed of three of them, with whom would be associated two of the assistant judges, endowed with special powers to that effect, and both the sections, so constituted, would sit separately until the rolls were exhausted.

These assistant judges would naturally be taken from the jurisdiction of Quebec and if the same want were felt in the latter, (which is not probable) the assistant judges would be taken from the jurisdiction of Montreal. It is not necessary to give the reason of this distinction.

The Court would then resume its regular course and would undoubtedly be sufficient for the despatch of ordinary business without allowing it to accumulate.

The quorum of the Court was fixed at four when the number of its judges was five. Now that there are six, the quorum should be raised to five. A Court composed of six judges with a quorum of four is an anomaly.

On the other hand there is no reason why the six judges cannot sit together and why the rule which excludes the sixth should be retained, if we do not give a compulsory form to the idea which dictated it and which was to hold the sixth judge in reserve for Criminal Courts and proceedings in chambers.

To complete the practical carrying out of this idea and not to expose the *personnel* of the Court to too many changes and not to interfere with the cases under advisement, by causing judges to sit in criminal cases, who have heard in appeal the cases in which no judgment has yet been rendered, the five judges would sit together in the Court of Appeals during a year and, during the whole of that year, the same judge would hold the Criminal Court. As, according to the amendment to be suggested, judgment in all the cases in

appeal should be rendered in every year before the vacation, another judge might hold the Court during the following year, and so on, each in turn.

Still nothing would prevent, if need be, any of the five judges holding the Court of Appeals, from sitting in the Criminal Court, nor the judge holding the Criminal Court from sitting in Appeal. The rule suggested should in no wise affect the general competency of the judges and it even should be left to their discretion. The raising of the quorum of the Court to five judges affords us an opportunity of referring to a singular result of the power, left to a simple majority of the Appeal judges, of reversing the judgment appealed from, without any regard to the number of judges who tried the case in the Courts below, even when such number, together with the minority of the Court of Appeals, comprises collectively a majority of opinions favorable to the judgment before the two Courts.

A judgment is rendered in the Superior Court by three judges sitting in review; appeal is taken from it before five judges. The majority of the latter reverse it against the opinion of the two others. Of the eight who have given judgment, five have decided in one sense and three in the other, and yet the party who has five judges in his favor loses his case. The majority which decided in favor of the losing party will be greater or less under other circumstances, according to the number of judges who have rendered judgment in both courts, but it is none the less true that under our judicial system, the minority of judges may prevail over the majority. If, in appeal, the majority is four to one, the losing party will have had as many judges in his favor as his more fortunate opponent.

Under the present system, such a result is inevitable. Still it is none the less calculated to diminish the confidence of the people in the Courts. Despite legal fictions and

abstract theses on the hierarchical relations of the Courts to each other, on the pre-eminence of the higher tribunals over the inferior ones, the public will never be convinced that, of the eight judges who render judgment, three can be better than five and that the party who has the least number of judges in his favor should gain his case against him who has the greater number!

This danger would not arise to such an extent in a country where the law would exact, from the appeal judges, qualifications of a higher order than those of the judges of the lower Courts, and offer to the public a pre-eminent guarantee of the superiority of the former over the latter; but such is not the case with us, where the judges of both Courts are selected from the ranks of the same body and under the same conditions as to moral and legal fitness.

It is therefore necessary to remove from the minority of judges the power of reversing the judgment of the majority and to save the public a spectacle which must blunt its moral sense and shake its faith in the Courts of the country. The way to remedy this defect in our practice would be to count, for the judgment in appeal, the opinions of the judges in the lower Court with that of the judges in appeal, and to reverse the former judgment only when it would be the decision of the majority of the judges collectively.

Before carrying this idea into effect, the commission deems it its duty to point out to the House an opinion which prevails, with respect to the system of expressing dissent on the Bench, from the judgments of the majority, by the judges who are in the minority, both in the Court of original jurisdiction and in appeal, upon which opinion however it does not intend to speak. It will simply state the reasons which may be adduced in support of this feeling, which is opposed to the practice in use and which considers as dangerous to the respect which is due to the

Bench, the public criticism by the judges of the judgments in which they refuse to concur. The following are the reasons in support thereof:

"However useful may be in certain countries, in England for instance, the custom of entering in the judgments the names of the judges who do not concur therein and of compelling such judges to state publicly their reasons for their dissent, the practice has not, with us, had very beneficial results. On the contrary, it has done a great deal of harm to the administration of justice and has rather contributed to cast discredit upon the Courts than to uphold their authority."

"When kept within proper bounds and exercised with that circumspection which the performance of so delicate a duty requires, the obligation imposed upon the judge, who dissents from a judgment, of criticizing it in support of his opinion, is hardly consistent with that deference which he owes to his colleagues and to the dignity of the Court of which he is a member. For, even when couched in the most courteous form and in carefully guarded language, the substance of his address nevertheless, may be resumed as follows: "I am right and my colleagues are wrong. I wish to render a good judgment and they, contrary to my advice, persist in rendering a bad one. The losing party should be the winner; he who is condemned to pay, owes nothing," and if the judgment orders coercive imprisonment: "an innocent man is being sent to prison."

"While the Court is rendering judgment, if an advocate makes any remarks against it, he is very soon reprimanded for attacking it and yet the judges who are appointed to administer justice and to cause it to be respected, take up a large part of the time of the sitting in trying to convince the public that the judgments rendered are not worth the paper on which the clerk writes them."

"The advocate is forbidden to criticize the judgment and not only is the judge, who is not pleased with it, permitted, but he is even ordered to cast discredit upon it. Such is the practical result of judicial dissent."

"A Court composed of five judges renders, on the same day, five judgments four judges concurring in each. The same judge does not dissent in several of the cases. In each of the five it is a new judge who does not agree with his colleagues. The result of these five dissents will be that, when the last judgment is pronounced, the five judges will have mutually reproached each other with having rendered bad decisions! Is not the public already sufficiently prejudiced against the Courts, for the judges themselves to refrain from warning it against their judgments? With such a system, is it to be wondered that an unfortunate suitor should find the judgment pronounced against him a bad one, when one of his judges has been careful enough to tell him so?"

"The most moderately expressed dissent cannot but throw blame upon the judgment which it attacks, and upon the Court which renders it. So that, even from the least objectionable view of it, the least we can say of dissent, is that it is an argument against the judgment."

"From a radically bad principle, good consequences cannot be deduced, and the country, therefore, has received no good from it, and if we to-day have uncertain jurisprudence, we in part owe it to the disagreement of the judges; disagreements so numerous, that there is scarcely a point of doctrine or practice upon which, after ten years or less passed upon the Bench, we can say that a judge has not differed from some of his colleagues or that one of his colleagues has not disagreed with him."

"The expression of this disagreement is authorized by the practice of the English Courts. In England, however,

the practice is justified by special reasons. Having no written law, it is the Courts which make the common law, and it is their view of the law which makes the jurisprudence. It might be said that, in addition to their judicial functions, the English Courts are schools of law. It is as much from the theoretical as the practical point of view, that the law is there laid down. The opinion of the judges scarcely blames the judgment which they do not approve. Every opinion is as much a dissertation on legal principles, as it is the appreciation of a suit at law. In any case, being only masters of the law, the judges are not, properly speaking, the judges of the case. The jury, who are the judges of the fact, decide it."

"It is not so with us. Governed by the French law, our Courts should decide as did formerly the Courts in France and as they now decide, that is to say, by the unanimous judgment of the Court, in which the minority silently rallies to the majority, and keeps secret its differences of opinion."

"It is not that there is in reality a substantial difference or a question of principle between the two systems. In both, the judgments are rendered by the majority, but one conceals the difference in opinion, and the other not only shows them, but makes a display of them."

"There is in this not a question of doctrine, but one of propriety. The practice of the French Courts seems better suited for our judicial habits, and notwithstanding the long observance of the English practice, it should be abolished."

"It may be noticed, that in the system proposed to be substituted for the present practice, there is no reason to fear that danger of secret decisions which the expression of dissent gives rise to—as the judgments would remain public and contain the reasons thereof, as at present, and these rea-

sons be publicly given by the president or one of the other judges, speaking for the Court. What we wish to avoid, is the public expression of dissent and the discussion of the judgments by the judges. There may, however, be some changes to be made in the present usage, without deviating from the principle."

The following is the manner in which the Commission proposes to apply the system suggested by it: to reverse the judgments only when the judges in appeal, who incline to such reversal, and the judges against the judgment in the court of original jurisdiction exceed the number of those who rendered it, including the judges of appeal who incline to its confirmation.

All the judgments of the court of original jurisdiction must be rendered under the new system, by a court presided over by two judges at least, and by three judges at most. The judges in appeal shall decide with a Bench of five. If the final judgment was rendered by two judges, without the participation of a third, and that, upon the appeal, four judges are for its reversal and the fifth for its confirmation, the judgment shall be reversed; for, the reversal will have four judges against the two of the court of original jurisdiction and the fifth judge of appeal. If the judgment was rendered unanimously by three judges, it would require, for its reversal, the unanimous decision of the judges in appeal, since, if four only inclined to that side, and the fifth dissented that is to say was in favor of confirming it, the eight judges would be equally divided, four against four. If the judgment was rendered by two against one, and that three judges of appeal incline to its reversal and two to its confirmation, it would be confirmed, as the eight judges would again be equally divided; the two judges of the court of original jurisdiction, and the two judges of appeal being favorable to the judgment, and the

third judge of the court of original jurisdiction, and the three judges in appeal being against it. It is not necessary to state that in all cases in which the five judges in appeal are unanimous in reversing it, it shall be reversed, the judges of the court of original jurisdiction being either unanimous or divided in their opinion, five forming always an absolute majority. Three judges in appeal voting for the confirmation, always form an absolute majority in this sense, and with greater reason, four. In any case they constitute the majority of the court.

To sum up, if the five judges in appeal who must necessarily take part in a judgment, so that it be validly rendered, are unanimous for its reversal, it will be reversed, and if four alone are of that opinion, it will not be reversed unless it has been rendered by only two judges. In all other combinations of votes in appeal, it will be confirmed, for all the judges who shall have taken part, as well in the court below as in appeal, will have been equally divided, or a majority will have been favorable to it.

In principle, this system which consists in counting the opinions of the first judges with those of the second, by granting to them an equal deliberative power, and in causing the judgment of the Court of Appeals to be rendered by the minority of the judges of the Court, by two against three and even by one against four, is, however, anomalous. It sins against the rules of the judicial hierarchy, which clothes the superior tribunals and their judges with a power of setting aside and an absolute pre-eminence over the inferior tribunals and over their judges. It is equally contrary to the constituting principles of deliberative bodies, of which the majority represents the whole and the minority itself, which is confounded with the majority and is absorbed by it.

On the other hand, if we follow these rules, we would constantly arrive at a result, which, while being more normal in theory, would be more abnormal in practice and much more objectionable to the public mind, that is the setting aside by the minority of the judges of the judgments rendered by the majority; the party who would have the judges in his favor, would still have the judgment against him, and he who would have gained the judges, would yet lose his case.

It is true that the powers of these judges are not equal, neither are they of equal dignity; in the judicial scale, some occupy a higher degree than others and the law proclaims the superiority of the Court of Appeals over the Court of original jurisdiction. The commission, which renders well-deserved homage to the various Courts of Appeal which have succeeded each other in this country and the existing Court in particular, does not wish to deny this superiority, as recognized by law; but, once more, these are but legal fictions, creations of positive law which cannot stifle the voice of public opinion, and induce it to acquiesce in the idea of the minority being right and the majority wrong.

We may count upon the law but we cannot argue against popular opinion, which will not believe in legal fictions and ignores inferences which offend its moral sense.

Nevertheless we might modify the rule requiring a collective majority of the judges to reverse a judgment and adopt another to the effect that when the majority of the Court of Appeals is opposed to the judgment, such judgment would be reversed if the result of the vote of the majority were an equal division of the number of votes in both Courts.

Thus the vote of four judges in appeal against the unanimous judgment of the Court of original jurisdiction,

and that of the fifth judge in Appeal being in its favor, would have the effect of reversing it because the eight judges would have been divided, four against four.

This modification of the rule would alter its wording as follows; instead of saying: "the majority of the Court of of Appeals shall not reverse the judgment unless such majority would leave those collectively in favor of the judgment in the minority, the votes of the judges of both courts being counted," we would say: "The majority of the judges in appeal, opposed to the judgment, will not be deprived of the power of reversing the judgment, except when such majority in appeal shall remain a minority of all the judges collectively, the votes of all the judges being counted."

In other words the following rule would be in force: "The judgments of the Court of Appeals shall be rendered by the majority of the votes, except when the votes of such majority cause a reversal of the judgment against a collective majority of the judges who took part therein; in which case such judgment shall be confirmed."

The only case in which this exception would arise would be that in which the judgment, having been rendered unanimously by the three judges of the Lower Court, would have against it in appeal only three judges, while the two others would be in its favor; for, in this case, there would be five judges in favor of the judgment and only three against it.

In every other case of a majority of the Court of Appeals being opposed to the judgment, it would be reversed, because such reversal would be supported by a number of judges greater than or equal to that in favor of the judgment.

A rule which would refuse to the majority of a Court the right of carrying out its decision, could not be applied

to a Court of original jurisdiction, except that under no given hypothesis, can the power to judge be given to the minority of the judges. But it is different with a Court of Appeals which, in reversing a judgment, exercises a revocatory power, which may, to a certain extent, be compared to the authority of a legislative body, repealing a law or any resolution, and to which we may validly say that instead of voting such repeal by a simple majority, it shall do so only on a vote of two-thirds of its members. Here the Legislature would refuse to a simple majority of the members of the Court of Appeals in a given case the right to reverse the judgment, and, as a result of such refusal, it would be confirmed.

Our legislation has already sanctioned a departure from the rule which compels Courts to give their judgments by a majority of their judges; it is in the case where an equal division of the judges in appeal has the effect of confirming the judgment. The law does not say that when the Court is equally divided the judgment shall be confirmed. A Court equally divided cannot pronounce a judgment; in such a case, the law says that the judgment shall remain confirmed, that is, untouched. This means, in other words that, as the Court is unable to render judgment, owing to its being equally divided, the first judgment, already clothed with the seal of public authority, retains its integrity.

In the case under consideration, the law which would refuse to the majority of the Court, the right of reversing the judgment, would not give the minority the power of confirming it,—it is contrary to the nature of things that the minority should decide—it would simply say that, as in such cases the Court cannot alter the judgment, it would remain confirmed.

It will thus be seen that the suggestion made by the commission does not derogate from accepted principles in

connection with the constitution of the Courts; and even if it did, the country would still find in the repeal of a custom which imperils the credit of its inhabitants, ample compensation for the sacrifice of a strict maxim of law; if indeed, in a matter so arbitrary and one of social propriety, governed by circumstances of time and place, there can be any question of dogmatic and absolute principles.

The Legislature might only adopt one or the other of these suggestions or both of them, for they can be combined. In effect the manner of rendering judgments might be altered and, instead of being publicly stated as is now done, the divided opinions might be kept secret, or the present custom might be maintained and the ruling of the majority, as laid down, might prevail in either or in both cases. These two suggestions are therefore distinct, and this is the reason why the commission proposes that one be adopted, and communicates its doubts as to the other, to the House.

We have already mentioned the proposing of a rule compelling the Court to exhaust the rolls at the end of each judicial year and before the summer vacation. If, as the end of the judicial year approaches, the Court finds that it has too many cases under advisement to dispose of them all, by continuing to hold its sittings and by hearing new cases, it might easily interrupt the hearings and postpone the unheard cases to the following year. This would be a lesser evil than keeping the older cases under advisement during the vacation.

After having proposed the above mentioned changes in the organization of the Court of Appeals and in the exercise of its jurisdiction, we will now enumerate the cases which come within its scope in civil matters.

We have mentioned the suppression of appeals from the Circuit or County Court; Superior Court cases therefore will be the only ones subject to appeal. We have also re-

commended that every judgment of the second division, from which an appeal is taken, should be taken before the first division. There will thus be no direct appeal from the second division to the Court of Appeals and the only judgments of the Superior Court on which the Court of Appeals shall sit, will be those of the first division.

The commission has also laid down the rule that no interlocutory judgment shall be taken directly into appeal, and that the appeal from every such judgment shall be effected at the same time as that from the final judgment, except in two cases;

1°. That in which, not being definitive because it does not put an end to the case and remaining interlocutory in form, the judgment is nevertheless final in its effect on the main issue of the case, such as a judgment in separation from bed and board which orders the liquidation of the matrimonial rights, and a judgment maintaining a petitory action, which orders the liquidation of the fruits;

2°. That in which the interlocutory judgment affects an incident which is not strictly connected with the main issue, inasmuch as it does not essentially affect the decision, from which it may be separated, and in which an appeal may be had without such appeal interrupting the trial of the main issue. To this must always be added the fact that the appeal from this interlocutory judgment, taken at the same time as on the final one, could not entirely remedy the evil which its execution would cause to the party. Such would be a judgment on a motion to quash a capias, a conservatory seizure, which hypotheses have already been alluded to.

The commission has also recommended the suppression of the appeal in all personal, real and mixed actions, in which the amount or pecuniary value of the thing claimed would not exceed the sum of $500, and has limited the ultimate

jurisdiction of the Superior Court to that amount, except however the case in which a capias is maintained and that in which a judgment carries with it coercive imprisonment, in actions for amounts less than that sum. It has thought that, considering the depreciation in the value of money, it would be contrary to the authority of judgments to allow the losing party to appeal and thus expose the winner to a second suit, after the judgment had been rendered by three judges, in suits for amounts not exceeding five hundred dollars. This principle has moreover been admitted for judgments of the Court of Review, by an act which, although repealed, has nevertheless retained its moral value. The Legislature will say whether the commission is wrong and whether suitors are to be allowed to overcome every obstacle opposed to their passion for litigation!

Finally, according to the proposed plan every judgment by default in the second division, taken into review before the first, is final.

It therefore follows from all which has been above stated, that, apart from the above mentioned exception of cases for amounts of $500 and under, and judgments by default taken into review before the first division, an appeal shall lie from every final judgment in contested cases rendered by the first division of the Superior Court, and that an appeal from interlocutory judgments will lie only in the two cases above alluded to, in which such judgment, apparently interlocutory, is to all intents final in reality, and that in which, not being essentially connected with the main issue, it has done an irreparable injury to the party.

The following amendments, in the form of separate articles, are proposed to the procedure in appeal:

ARTICLE 177.

The exercise of the right of appeal from the Court of original jurisdiction to the Court of Appeals, which shall, as heretofore, be subject to article 1117 of the Code of Civil Procedure, is limited to three months, in place of one year, and such delay is binding upon incapacitated persons, as prescribed in article 1118 of that Code.

ARTICLE 178.

The Court of Review being suppressed, the exception made to article 1118 by article 823, which provides for the appeal within three days, from a judgment of the Court of Review ordering a discharge of an imprisoned defendant, and the latter part of the said article 1118 which provides that the appeal from judgments of the Court of original jurisdiction cannot be brought during the delay allowed for an appeal to the Court of Review or after such review is taken, become inapplicable.

ARTICLE 179.

The two other exceptions to the ordinary delay for appealing, given by the said article 1118, which limits the exercise of the right of appeal to forty days, in the case of article 1033, from judgments rendered in virtue of chapter 10 of title 2 of book 2 of the second part of the Code, respecting proceedings taken against corporations, illegally formed or acting in violation or in excess of their powers, and in that of article 1037 respecting judgments

rendered in virtue of chapter 1 of the same title and book of the same part of the Code, upon information requiring the cancelling of Letters Patent, are amended, in that, in both these cases, the delay is limited to twenty days.

ARTICLE 180.

The intermediate provision of the said article 1118, which ena[illegible] that if the party dies before the appeal, the delay is reckoned from the day of his death, against his heirs or legal representatives, is modified so that of the delay of three months to appeal, the balance only, not expired at the death of the *de cujus*, shall be allowed to his heirs and rep[illegible]sentatives, but such delay shall be reckoned only from the day of the acceptance of the succession or of the term allowed to make an inventory and deliberate, if such acceptance has not taken place before.

ARTICLE 181.

In the case of judgments rendered against minors, wives under marital control, persons affected with mental aberration, whether interdicted or not, and against persons absent from the province, without the previous joinder in the action of the husband, tutor or curator, to the interdicted or absent person, the delay to appeal is reckoned only from the day of the service of the judgment upon the husband, tutor or curator appointed before or after judgment, on the petition of the party who has obtained the judgment, or upon the petition of other persons interested.

ARTICLE 182.

The distinction between error and appeal in civil matters is abolished, and the recourse against a judgment

of a court of original jurisdiction, rendered upon the verdict of a special jury, shall be exercised by an ordinary appeal, as from any other judgment.

ARTICLE 183.

The writ of appeal and the writ of error are abolished.

ARTICLE 184.

The appeal is exercised by a simple declaration, containing the statement of the facts now required in writs of error and appeal, of which the party appealing makes a simple declaration. Upon this declaration is set the seal of the Court of Appeals by the clerk of that court, who countersigns it, upon payment to him of the required fee, and it is entered in the register of the Court in the manner now followed for the writ of error and the writ of appeal.

ARTICLE 185.

The day of the return of this declaration, the delay on which is twenty days counting from such entry, is mentioned in such declaration and inserted in the register by the clerk.

ARTICLE 186.

This declaration may be produced, countersigned and entered in the register at any time during the delay to appeal as above limited, as are now the writs of error and appeal, and the appeal is followed up on this declaration as at present upon such writs.

ARTICLE 187.

It is served upon the adverse party and returned to the office of the Court *à quo*, in which is given the security in

appeal, after notice to the other party, of the nature of the security and of the names of the sureties which the appellant intends to furnish, given at the same time as the service of the declaration or by a separate notice.

ARTICLE 188.

The security is to the effect that the party appellant will efficiently prosecute the appeal, and that, otherwise, he will indemnify the adverse party for the damages arising from his default and pay the amount of the condemnation pronounced against him by the judgment appealed from, and the costs of the appeal, if such judgment is confirmed, or in so far as such judgment shall be confirmed.

ARTICLE 189.

The appellant who, by a declaration to that effect, produced in the office, states that he does not oppose the execution of the judgment rendered against him, or who deposits in current money the amount of the judgment in capital and interest, or who in the terms of article 1963 of the Civil Code deposits some sufficient pledge or hypothec, is however only obliged to furnish security for the costs of appeal if he be condemned thereto, or to deposit the probable amount thereof, established by the officer called upon to decide upon the validity of the security.

ARTICLE 190.

If, in such case, the judgment is reversed, the party who has caused the judgment to be executed is bound to refund to the appellant the net amount only of the moneys received by him under the execution, with interest, or to restore the property of which he was put in possession, or the va-

lue of such property if it is no longer in existence or in his possession, together with the rents, issues and profits thereof.

ARTICLE 191.

The security shall be given by two sureties fulfilling the conditions required by article 1938 of the Civil Code, one of whom at least owns real property to the value of the amount of the security, free from all charges, debts and hypothecs. Such property shall be specially described in the bond, and the respondent may register the bond hypothecarily against such property to the amount of such security.

ARTICLE 192.

The security is received before a judge or the clerk of the Court *à quo*, who are authorized, either of their own motion or at the request of the adverse party, to cause the sureties to justify of their sufficiency under oath, and in this respect, under the said oath, to put to them all the questions they deem necessary for such purpose.

ARTICLE 193.

In place of security, the party may deposit in current money the amount of such security, or in the terms of article 1963 of the Civil Code, deposit a sufficient pledge or hypothec, as stated above in article 189.

ARTICLE 194.

The judge or the prothonotary are equally authorized to cause the party to be sworn as to the sufficiency of such pledge and of such hypothec, and, in this respect, to put to him all the questions they deem suitable, and to require any additional proof, the nature whereof is within their discretion.

ARTICLE 195.

The respondent may object to the receipt of such security, deposit, pledge or hypothec, contest their sufficiency, and, in the discretion of the judge or clerk, be admitted to contradict them by title, affidavits and other legal proof.

ARTICLE 196.

After the fulfilment, to the satisfaction of the judge or the prothonotary, of the formalities and conditions prescribed by the above articles, the appeal is allowed. The respondent has always the right of requiring that these formalities and conditions be fulfilled and that such allowance be given before a judge. It is only from the time of such allowance that the appeal is deemed to be taken, and that in the case in which the appellant has not consented to the execution of the judgment, it has the effect of suspending it.

ARTICLE 197.

The appeal having been so allowed, the clerk, upon payment to him of a sum of to meet the costs, transmits the record to the Court of Appeals, together with a numbered schedule of the papers therein, with a duplicate of the security of which he keeps the original, and the declaration in appeal, a duplicate of which he keeps in his office.

ARTICLE 198.

It is not, however, necessary that the whole record should be produced in the office of the Court of Appeals; the parties may consent to the production of only the part of such record agreed upon between them, and the rest of the record remains in the office of the court *à quo*, saving the right of its being produced, in whole or in part, before the Court of Appeals, if necessary.

ARTICLE 199.

Even without the consent of all the parties, and upon the application of only one of them, the judge, *à quo*, or the clerk may, in case the transmission of the whole record is unnecessary, select the part to be transmitted, saving, as in the preceding article, the right of having the rest or part thereof transmitted before the Court of Appeals, at a future time.

ARTICLE 200.

The clerk of the Court of Appeals receives the record and gives to the clerk, *à quo*, a certificate of such receipt.

ARTICLE 201.

If the clerk does not produce the record within the delay for the return of the appeal, the appellant and the respondent, if the latter has appeared on the appeal, may separately or jointly, on a simple notice, with a delay of two days, if the judgment was rendered in the districts of Quebec or Montreal, and of four days if in the circuit districts, apply to the second division of the court *à quo*, and compel him to produce it within a delay peremptorily fixed by the court, under all legal penalties, and even by coercive imprisonment, and cause him to be condemned to the costs of the incident, and all those occasioned by his delay. This demand may also be made to the Court of Appeals, or to a judge of that court, in chambers.

ARTICLE 202.

It is lawful for the appellant and respondent to appear before the Court of Appeals at any time after the allowance of the appeal.

This appearance is obligatory upon both parties within eight days after the day fixed for the return of the appeal, if on that day the proceedings are returned ; if not within the same delay after such return.

ARTICLE 203.

If, at the expiration of the delay, the appellant has not appeared, the appeal is deemed to have been abandoned, and the respondent, who has appeared, may have it dismissed.

ARTICLE 204.

If, within this same delay, the respondent has not appeared, the appellant, if he has appeared, may obtain the benefit of a default against him, and proceed alone on the appeal.

ARTICLE 205.

The Court of Appeals or a judge of appeal, in chambers, may, however, in either case permit the appearance and pronounce only upon the costs of the incident.

ARTICLE 206.

The grounds of exception against the appeal, arising from the fact that the judgment is not susceptible of appeal, that the appeal has been taken outside the delays, the renunciation of the appellant or his acquiescence on the judgment, or from any other legal cause, may be raised by simple motion of the respondent, after two days' notice to the appellant.

ARTICLE 207.

This notice, under penalty of forfeiture, is to be given within four days of the appearance of the respondent, and

the motion presented at the first sitting of the Court held after such notice, except in the case of a lawful impediment, in which case such delay may be enlarged by the Court on cause shown.

ARTICLE 208.

If the grounds of exception to the appeal have arisen after the appearance, or if they have come to the knowledge of the respondent only after such appearance, he must invoke them without delay. The appreciation of the duration of his negligence to allege such grounds is discretionary with the Court.

ARTICLE 209.

The insufficiency of the security must be invoked at the first sitting of the Court next after the expiration of the four days, counting from the appearance of the respondent.

The insufficiency of the security arising after the allowance of the appeal, is to be invoked without delay, after the knowledge thereof has come to the respondent, as in the case of article 208, and, in the same manner, the appreciation of the negligence of the respondent is in the discretion of the Court.

ARTICLE 210.

The insufficiency of the security does not occasion the dismissal of the appeal, unless upon the default of the appellant to obey the order of the Court which ordered him to complete it, or furnish new security.

ARTICLE 211.

The new security or the supplement to the first, must fulfil the conditions required by articles 187, 188 and 189

ARTICLE 212.

It is before a judge of the Court of Appeals that the new security is given, and the first completed.

ARTICLE 213.

Within the meaning of article 157 and following, up to article 212, the Court, *à quo*, is that in whose register the judgment appealed from has been enregistered, and before which it should be executed.

With respect to circuit districts, the judge or one of the judges referred to in these articles, is the judge residing within the jurisdiction of such Court, or one of the judges of the circuit, or the county judge.

ARTICLE 214.

Reasons of appeal and answers to such reasons are abolished.

ARTICLE 215.

Within fifteen days from the appearance of the parties, they shall each produce a printed factum, which, with the declaration in appeal, is the only proceeding required in the appeal.

ARTICLE 216.

With the consent of the parties, the Court may, in cases of great simplicity, dispense with this printed factum, and even with the printing of the exhibits, proceedings of record and proof, and permit the hearing on written factums, as it is now done before the Court of Review.

ARTICLE 217

With the same consent and permission, the parties may produce a joint printed or written factum, in which

shall be set forth a statement, agreed upon between them, of the facts considered as admitted or proved, and the questions of law or fact, or of both, raised by the appeal.

ARTICLE 218.

The Court, or a member of the Court, may dispense with more ample factums.

ARTICLE 219.

In case this is refused, and more ample factums are required, the parties may each prepare a distinct factum, or severally add to the joint factum their particular factums.

ARTICLE 220.

The default to produce factums within the fifteen days involves *pleno jure* a foreclosure.

ARTICLE 221.

If such foreclosure is incurred by the appellant, the appeal shall be dismissed; if by the respondent, he shall not be heard upon the appeal, and the appellant may proceed on the appeal by default. The Court, for sufficient reasons may, however, relieve the parties from such foreclosure.

ARTICLE 222.

Fifteen days after the production of the factums, or of one of the factums, if the other party is foreclosed, the clerk, without any proceedings being necessary on behalf of the parties, places the case on the roll of the Court, where it is heard in its turn, and cannot be continued except for good reasons.

ARTICLE 223.

As we have already seen, the appeal to the Privy Council is abolished.

CHAPTER FIFTH.

REORGANIZATION OF THE OFFICE OF BAILIFF.

We stated in our preface.

"Another subject of reform, will be the reorganization of the office of bailiff, which holds, in our judicial system, a rank which is not without its importance, and which owes less to the nature of its functions, than to the abuses that have disgraced their exercise, the existing prejudices against it."

These few lines contain the germ of the principles upon which are based the law we suggest, in order to attain the end, so set forth.

The causes which have cast discredit upon the office of bailiff and the disgrace thereby attaching to the administration of justice, are numerous. The ignorance of the bailiffs, their want of knowledge of the laws regulating their office and the practice of their calling; the lowering of the moral level of this class, who, with rare exceptions, are all liable to reproach; the indefinite and excessive number of bailiffs which, as a rule, takes away from them the means of acquiring, by the exercise of their calling, an honest competence and occupying an honorable position in society; the want of supervision over the bailiffs by the judicial authority, and their complete irresponsibility towards the public, whose opinion exercises no moral influence over them, and who have no recourse against them, to remedy the evils of their double dealings and the damages occasioned to the parties by the faulty discharge of their duties; finally, the absence of legislative provisions or judicial rules to regulate their admission to office; such are these

causes, and it is to remedy their hurtful effects and obtain contrary results, that the Commission proposes the present Act.

By reducing the number of bailiffs to that required by the public, and exacting from aspirants to that office certain moral and educational qualifications, especially by submitting them to a severe supervision on the part of the judicial authority, the calling would be regenerated; in less time than we think, it would be made an enviable one, and its members would be assured of an honest competence and the means of attaining that position in society to which the nature of their office and its rank in the judicial system entitles them. In a word, this office would be made an honorable and useful career, which educated men would no longer fear to enter.

Hundreds of young men and heads of families, fully educated, are to-day without employment or the hope of obtaining any. Would it not be better for them to seek in this reformed calling, their bread, competence even, and an honorable position, than to wait during a long time in vain for it in the liberal professions, which are hopelessly crowded.

In addition then to its intrinsic and judicial advantages, the reformation of the calling of bailiff would open up in this country a new career for merit and education.

These are the various considerations which induced the Commission to prepare the following Bill:

An Act to reorganize the office of Bailiff.

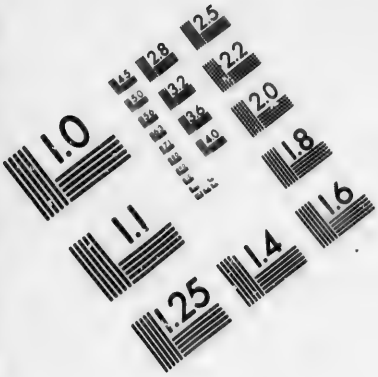
WHEREAS from the nature of their duties, the bailiffs hold an important place before the courts, whose orders they serve and judgments they execute; whereas by the former laws of the country, the present functions of sheriffs

n civil matters were performed by bailiffs, thereby showing the analogy between t[illegible] two offices, which was recognized by our statuto[illegible] legi[illegible]tio[illegible] d especially by the statute of the late Province [illegible] nada, 6 William 4, chap. 15, and for these reasons [illegible] iliffs should be placed under the supervision and responsibility of the sheriffs, of whom they are, to a c[illegible]ain extent, the deputies;

WHEREAS, on the other hand, the advocates who constantly require the services of bailiffs, cannot but suffer from their inability to perform their duties, and the dignity of their order is interested in the reform of this calling;

WHEREAS the judg[illegible], upon whom should rest the appointment of bailiff[illegible], have not sufficient information, as to the personal qualities and capacity of aspirants, to make a good selection, they are without the information necessary to allot the number in proportion to the wants of the various jurisdictions, and, in this respect, the sheriffs and advocates are their natural advisers and auxiliaries, and should be their substitutes in the reorganization of such calling, so as to raise it to the level of the duties imposed upon it by the new laws, to reduce the number of its members to that required, and provide for the selection of suitable persons;

WHEREAS, finally, it has become necessary to reorganize the office of bailiff, by compelling, at the same time, the present bailiffs who have not given security, or whose security is no longer in force, to furnish other sureties, and in order to carry out this reorganization which would have for its object to submit the admission of new bailiffs to conditions of eligibility of a higher moral and literary character, to provide for the removal and suspension of bailiffs in cases of necessity, the creation of a Council, clothed with the powers to be set forth in the present Act, seems to the Legislature to be the most suitable and efficient means of attaining these ends;



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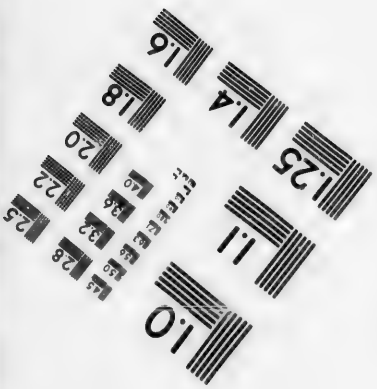

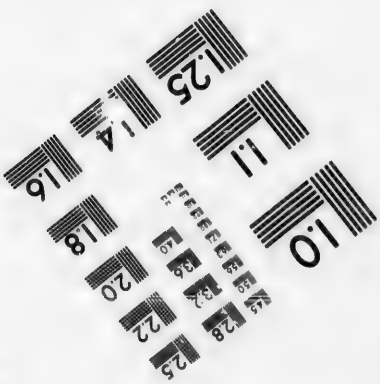

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Therefore, Her Majesty, by and with the advice and consent of the Legislature of Quebec, enacts as follows:

1. In the interval between the sanctioning of the present act and the day fixed by proclamation of the Lieutenant-Governor for its coming into force, the sheriff of each district shall determine, in concert with the Advocate-General, the batonniers of the order of advocates in the districts in which a batonnier-general or a batonnier of a section of the bar resides, and with the judge of the Superior Court or County Judge in the other districts, the number of bailiffs necessary for the Superior Court of the district, regard being had to the requirements of the public service, taking care to avoid raising the number disproportionately to such requirements, and, by undue competition, prejudicing the honest gains of the members of this calling, and attracting thereto unworthy aspirants, who are detrimental to the respectability of the body and the honor of the courts.

2. It shall be the duty of every batonnier to consult the council of his section, before acting in concert with the sheriff in this matter.

3. The number having been so established, the sheriff shall communicate the result of the operation to the clerk of the Superior Court, who shall make an entry thereof in the register, and, with the exception of the former bailiffs who, upon fulfilling the requirements hereinafter set forth, shall have, at the time of the coming into force of this act, the right to continue the exercise of their calling, the number of bailiffs shall at no time exceed the number so established or thereafter altered.

4. On a further consultation between the sheriff, Advocate-General, judge or batonnier, the latter, after

having again consulted with the council of the section, the number so established may be, from time to time, afterwards changed, diminished or increased, in any or all of such districts of the Superior Court.

5. In the aforesaid interval between the sanctioning and the coming into force of this act, every bailiff of the Superior Court, who wishes to continue the exercise of his calling after that time, shall give notice thereof to the sheriff, and, if he has not already furnished the security required by the former laws, or if such security is no longer in force, shall furnish the security required by section 33 of this act, and on producing, at the office of the court, a certificate of the sheriff to that effect, he shall be admitted to continue the exercise of his calling as theretofore.

6. Nothing in the foregoing provisions, shall compel any bailiff who has not furnished security or whose security has lapsed, to furnish new security to continue the exercise of his calling, in the interval between such two periods, but if he has not furnished such security on the day preceding the coming into force of this act, his powers shall be revoked, and to exercise the office of bailiff, he shall, on submitting to the required conditions, be newly admitted to or entered upon the roll of bailiffs, as if he had never before been such bailiff.

7. The bailiff whose security shall be in force at the time of the sanctioning of this act, shall continue to exercise his calling, without other security, and without the observance of any new formality.

8. During the course of a month after such sanction, the sheriff of every district shall obtain from the clerk of the Superior Court, if he has not one already, a list of all the bailiffs having a right to practice in the district; after the

name of each of these bailiffs shall be entered the date of the security, or the default of security, and upon receipt of such list, it shall be the duty of such sheriff to verify whether such security is in force.

9. During the same period of one month, after having verified the correctness of such list, corrected it if necessary, and made the inquiry required by the latter part of the preceding section, the sheriff shall post up in his office the list so corrected, if necessary, of all the practising bailiffs of the district, distinguishing those who have given, from those who have not given, security, and mentioning the cases in which the security is not in force.

10. He shall notify the bailiffs entered upon such list who have not given security, or whose security has lapsed, of the fact which concerns them, without, however, the want of sending or receiving such notification relieving the bailiff from the consequences of his default.

11. Any bailiff, feeling himself aggrieved by such imperfect list, may cause it to be corrected by the sheriff.

12. It shall be lawful for any bailiff in default, to furnish, before the sheriff, from the time of the sanctioning until the coming into force of this Act, the security prescribed in section 33, and such security shall relieve him from such default.

13. Every new security so furnished shall be mentioned on the list, after the name of the bailiff so relieved from his default.

On the day of the coming into force of this Act, the sheriff of every district shall produce in the office of the clerk of the Superior Court, the list of bailiffs that he has received from the clerk, corrected and amplified if necessary.

14. Every clerk of such Court shall choose, from the bailiffs entered on such list, those who appear to have given, as well before as after the coming into force of this act, the security required in virtue of the foregoing provisions, and shall form the roll or register of bailiffs of the Court, upon which he shall add the bailiffs who shall be afterwards appointed, and from which shall be struck the bailiffs retiring from office, by decease, resignation, dismissal or otherwise.

15. Only the bailiffs so entered upon the roll of each Court shall have the right of practising before the Court, the powers of the others being revoked *pleno jure*, and they shall have no more right to practise without a new admission than those who have never been admitted to the office.

16. Whatever may be the number of the first bailiffs, they shall remain in office, even if they are in excess of the number determined by sections 1, 3, and 4; but so long as such number is not reduced, by the retiring from office of such bailiffs, below the number so determined by those sections, no new appointments shall be made. If such first bailiffs do not reach the fixed number, no new nominations shall be made which shall have the effect of causing this number to be exceeded by the total number of old and new bailiffs, and at no time shall there be upon the roll a number of bailiffs, in excess of the original figure or that afterwards changed, authorized to practise at the same time before the same Court.

17. To be admitted to the office of bailiff, the following qualifications are requisite:

1. To be a British subject;
2. To be of full age;
3. To be of honest habits, undoubted sobriety, and in the enjoyment of a character without reproach;

4. To be sufficiently educated so as to write correctly the English or French language, to be under no legal disqualification, and not subject to any of the following causes for exclusion (these causes shall be given later);

5. To have, on admission, a sufficient knowledge of the duties of his office, to give to the public a guarantee of the faithful performance thereof.

18. Whoever aspires to the office of bailiff, shall post up and keep posted during one month, on the outside of the door of and in the office of the sheriff, and in that of the prothonotary of the district for which he wishes to be admitted, a notice of his intention of presenting himself before the sheriff, to show his fitness for such office, on the day therein fixed; which day shall not be less nor more than five weeks from the day of such posting up.

19. If there is only one French newspaper or one English newspaper in the locality, or if there are one or more French newspapers, or one or more English newspapers, or one or more newspapers published in both languages at the *chef-lieu*, or in default of publication at the *chef-lieu*, in any other place in the district, four insertions of such notice in French or in English, or in French and in English in such newspaper, or in two of such newspapers, must be published, in the language of their publication respectively, once-a-week during the course of the four weeks included, from the day of the posting up to the day on which the candidate presents himself before the sheriff.

20. Upon the day fixed in such notice, the candidate presents himself before the sheriff, who ascertains whether his admission will not increase the number of bailiffs beyond that required, and in such case no further action is taken on his demand. In the contrary case, upon payment of a fee of $....., the candidate shall produce a certificate

in the form of schedule 1 of this act, signed by twenty-five municipal electors of the local municipality in which he resides, as to his morals, his reputation and sobriety, and prove the accomplishment of the formalities prescribed by the above sections 18 and 19.

21. Upon payment of such fee, production of the certificate and proof of the accomplishment of these formalities, he is admitted to examination.

22. Any person is, however, at liberty to object, either verbally or in writing, owing to his want of the necessary qualifications, his unworthiness, incapacity or exclusion set forth by section 17 above, to the admission of the candidate, and proof is at once taken upon the opposition and the examination proceeded with, if the opposition is rejected, or upon such later day, as may be decided by the sheriff.

23. In the districts in which the batonnier-general or a batonnier of a section resides, the proof upon such opposition and the examination of the candidate, if the opposition is rejected or if there is no opposition to the demand, takes place before the sheriff and one of these batonniers, and in the district in which the Advocate-General resides, before these three officers, or two of them.

24. In districts where there is no batonnier, the proceedings are held before the sheriff and the judge of the Superior Court, or the County judge.

25. The proof upon the opposition is adduced orally in the presence of the parties; the candidate may take part therein, and produce witnesses to rebut the evidence of the opposant and establish his fitness.

26. It is not as a court, but as a council, that these officers entrusted with deciding upon the opposition and

the examination of the candidate, act and hold their sittings.

They are, however, clothed with the powers of coercion recognized by law, for causing the authority of the courts to be respected.

27. The council shall dispose at once of such opposition or defer the decision to the next day, or the council may proceed with the examination of the candidate, reserving the decision upon the opposition.

28. In maintaining the opposition, such decision may declare that the candidate shall be forever excluded from the faculty of presenting himself for admission to the office of bailiff, or only during a limited time, and if such decision does not contain such a provision, it shall not prevent the candidate from subsequently exercising such faculty.

29. Such decision shall be respected in all the other districts of the Superior Court, and the candidate against whom a permanent or temporary exclusion shall have been pronounced, shall, for the future, not have the right at any time, or before the time fixed, to present himself for examination.

30. The nature of the tests required in the examination shall be discretionary with the council, but no candidate shall be admitted to exercise the calling of bailiff unless he shall have proved, to the complete satisfaction of the council, that he possesses the moral and literary qualifications required by section 17, and that he has a sufficient knowledge of the duties of his office, and the ability required to discharge the duties thereof, immediately after his admission.

31. The admission of the candidate shall be attested by a certificate in the form of schedule 2, granted to him by the members of the council, whose decision shall be valid only

when they are unanimous. Any dissent in the council, either on the opposition or on the admission of the candidate, shall have the effect of staying the demand, saving the candidate's right to renew it afterwards.

32. After the granting of such certificate to the candidate, he shall furnish security by two solvent sureties in the collective sum of $2000, that is to say, security by each of these two persons to the sum of $1000, for the benefit of all those towards whom he might incur any responsibility in the exercise of his office and of the public treasury, for the payment of the fines to which he might become liable.

The sureties shall justify their sufficiency to the required sum under oath or otherwise, as shall be prescribed by the sheriff, before whom the security shall be given.

33. Such security is given in the form of schedule 3, nominally in favor of the sheriff, but in reality for the benefit of the public, and particularly for the benefit of all persons towards whom the bailiff may be condemned, by reason of the damages committed in the exercise of his office, and for the benefit of the public treasury for the recovery of the fines which he may incur. Such security may, as required, be invoked by the creditor for such damages, and by the Crown, as if it had been given nominally in favor of such creditor or the Crown.

34. Such security, transmitted by the sheriff to the clerk, shall remain in the archives of the court, but the sheriff shall retain a duplicate among his archives.

35. Furnished with the certificate of the council and that showing the acceptance of his security, the candidate presents himself in the office of the court, and his name is added by the clerk to the roll of bailiffs of the district. Such inscription constitutes in his favor a formal admission

to the office of bailiff, of which, for all purposes, he shall possess the titles, powers, profits, privileges and prerogatives, as he shall become subject to the responsibility and duties of such office.

36. The fee paid to the sheriff for the security shall be, $....., and to the clerk for the inscription upon the roll, $.....

37. It shall be the duty of every bailiff, under penalty of dismissal, to inform the sheriff, so soon as the fact shall have come to his knowledge, of the death, departure from the province, or insolvency of either of his sureties, and in every such case, to renew his security before such officer, that is to say, to give another bond similar to the first, or to complete such security, given before or after the passing of this act.

38. Any bailiff, who shall, after such event, perform any duty of his office or any other having the effect of causing his security to lapse, in whole or in part, without completing it or having given a new bond, shall *ipso facto*, incur dismissal, and shall further become, for every such act, liable to a fine of $....., recoverable by the sheriff in his official capacity, by an action of debt for that amount.

39. It shall be the duty of the sheriff of every district, to see to the execution of the two above sections, under the penalty of misfeasance of office.

40. In the first week of every year, the sheriff shall inspect the registers of civil status of each locality in his district, kept for the preceding year, and deposited in the office of the Superior Court, and ascertain whether, among the acts of burial noted in such register, there is that of any surety of a bailiff within the jurisdiction.

41. Every public officer, to whatever service he may belong, whether mayor, municipal councillor, clerk of the Superior Court or County Court, bailiff, and every officer of any rank and quality, who shall know of the insufficiency or the lapsing of the security of a bailiff, from whatever cause arising, shall inform the sheriff and Advocate-General thereof.

42. The Advocate-General shall, on his side, see to the carrying out of the five preceding sections.

43. Every bailiff shall be obliged to indemnify the party employing him, for the costs and damages occasioned by the improper performance of his duty, and the judgment which shall declare the nullity of such proceedings, may carry against the bailiff a condemnation in damages, for the benefit of the party aggrieved by such proceeding.

44. No bailiff shall, without lawful cause, refuse the assistance of his services to any party requiring them, and every such refusal renders him liable to the penalty set forth in section 30 above, recoverable as set forth in the said section.

45. Every bailiff shall be subject to removal from office for the following acts:

1. Conviction for felony, misdemeanor and any act implying infamy;
2. Notorious misconduct;
3. Drunkenness;
4. The commission of any act, which, if it had been committed before his admission, would have excluded him;
5. Extortion committed in the exercise of the duties of his office; and finally,
6. Any act of immorality, abuse of power, and every misfeasance of office, which the Council shall deem of a nature to justify such penalty.

46. Simple suspension for a time, the duration of which is in the discretion of the Council, may be pronounced in place of dismissal.

47. The parties competent to cause the dismissal or suspension of a bailiff are:

1. The Advocate-General in all the districts;
2. Any sheriff in his district;
3. The batonnier-general throughout the Province, or the batonnier of each section within the limits of such section.

48. Every person, to whose knowledge shall come an act of the nature of those set forth in section 45, and which is sufficient to cause the dismissal of a bailiff, shall give immediate notice thereof to any of the officers mentioned in the preceding section.

49. The procedure respecting the dismissal of a bailiff is the following:

The Advocate General, sheriff or batonnier prepares a statement of the facts charged against the bailiff, and has it served upon him with a notice to appear within eight days of the service, at the office of the sheriff, to answer such complaint. The bailiff appears in the office of the sheriff, in the districts in which the Advocate-General and a batonnier reside, before such Advocate-General, batonnier and sheriff, or two of them; in the districts in which the Advocate-General does not reside, but in which a batonnier resides, before such batonnier and sheriff; and in the other districts before the judge of the Superior Court or the judge of the County Court and the sheriff, and after producing his defence, either verbally or in writing, proof is adduced before two or three of these officers, as the case may be, who shall sit in council, as stated in section 25 above.

50. If the bailiff does not appear, the council may proceed by default against him, and he shall be dealt with as set forth in the following section.

51. After the proof is taken by default, in the case of the non-appearance of the bailiff, or in the presence of the parties, in the case of the appearance and pleading of the bailiff, in which case it shall be lawful for him to bring forward witnesses and enter into a full defence, the Council shall dismiss or suspend from or maintain the accused bailiff in the exercise of his office.

52. If the bailiff is maintained in his office, no record of the accusation or of the decision of the Council, which shall remain in the archives of the sheriff with the record, shall be made in the office of the Court, and if he is dismissed or suspended, a record of the decision, and of its date shall be entered on the roll after his name.

53. From the time of the entry of the record on the roll, the bailiff shall be dismissed or suspended from his office, and, in addition to the penalty of the nullity of all services or official acts of the bailiff, performed during such suspension or after such dismissal, he shall incur, for every such act, a fine of $....., recoverable by the sheriff, as provided in section 38. For the recovery of such fine from such bailiff, an ordinary execution shall be taken against his property, and, in default of property, coercive imprisonment may be employed.

54. The amount of such fine, if recovered, shall be, by the sheriff, paid into the provincial treasury, to become part of the general revenue fund of the province.

55. Upon the dismissal, resignation, death or withdrawal from office of any bailiff, for any cause whatever, the number of the bailiffs upon the roll shall be reduced by so

much, and the blanks so left in the ranks of the bailiffs shall be filled up according to the provisions of this Act.

56. The suspension of a bailiff shall not produce the effects set forth in the preceding section, and after the expiration of the time of such suspension, he shall re-enter upon the performance of the duties of his office.

57. The bailiff who, during such suspension, shall perform any act of his office, in addition to the nullity of such act and the penalty incurred in virtue of section 53, shall become liable to dismissal.

58. An Act based upon the same principles may apply *mutatis mutandis* to the bailiffs of the Court of Appeals.

CHAPTER SIXTH.

Of the competence of the Judges of the Superior Court in controverted elections.

"The jurisdiction given to the ordinary judges over the revision of electoral lists, the contestation of elections of members of the Provincial Legislature, impose duties upon the Courts that are foreign to them, and at the same time compromise their independence."

The foregoing is the opinion expressed by the Commission in its report with respect to election contestations.

To follow the order and keep the promise made in this report, this would be the place to mention the proposed reform upon these two subjects. But as these subjects only indirectly relate to the judicial reforms, with which they have no connection, except from their being placed

under the jurisdiction of the ordinary tribunals, and that they naturally belong to the domain of politics, we will explain this reform only under the title of Constitutional Law, when the Commission shall have reached that portion of the general work of the codification.

In the meantime, one proposition alone requires to be demonstrated: the danger to the proper administration of justice in causing election contestations to be decided by the ordinary tribunals.

Yielding to the persistent recriminations of public opinion against the jurisdiction of the House over election contestations, the Legislature referred their cognizance to the ordinary tribunals,* that is to say, to the Superior Court.

Has this new practice, which introduced an innovation contrary to the theory of the law, in the judicial powers of the civil courts, created to put an end to the differences between private parties, and to apply private law and not to decide upon political questions, generally and as a matter of theory, produced more satisfactory results than the former system? This is a question which is not within our province, and to which, if we were obliged to give an answer, we would reply doubtfully.

That which, however, is not doubtful, is the tendency of this irregular jurisdiction to throw suspicion upon judicial independence, and to shake the confidence of the public in the integrity of judgments.

We will not ask, if, in a country in which politics exercise an absolute sway, in which it even extends to the actions of ordinary life, absorbs nearly the whole social system, and makes judicial appointments—often from the parliamentary arena—we do not ask, we say, if in cases which so

* We intentionally confine our disapproval to the reference of election contestations to the ordinary tribunals, for the same objection cannot be raised to the creation of a special court for the hearing of such cases.

closely touch party interests, it is quite possible to withdraw from these influences, the judges called upon to decide them. Our respect for the Canadian Bench, a Bench which is upright and without reproach, forbids such a question. But this question, which we do not wish to ask, the public itself, prejudiced by political errors, does, or if it does it is not, because it has already answered the question in the negative.

It will be said that the judge is no more free from the suspicion of the parties in ordinary than in political cases; this may be true, but, in ordinary cases, the parties rarely have any pretext to attribute interested motives to him; in such cases, his reputation for impartiality has to strive only against the malice of the losing party and his friends, whilst in political cases, it has to struggle with the passions of the masses, of whom one-half depreciate his judgment, while the other half do not appreciate it at its value.

This malice, we will again be told, born of party spite, will not survive the political passions that gave rise to it, a new interest, arising out of a thousand political caprices, which to-day rejoices in the results which it deplored yesterday, will cause it to be forgotten; it will gradually be effaced from public notice, and will end by disappearing.

It will be effaced, but as is effaced a stain upon spongy fabrics, which, in spreading, enters into the whole tissue. It will disappear from the memory of party ringleaders, who, to serve a momentary interest, and, at the same time, not believing it, have provoked its manifestation; but, in the public feeling which has been misled, and which although in error, is in good faith, this sentiment remains, or if it passes away, it will be only after it has lowered the Courts in the public estimation, and it will leave an uneasy distrust in the administration of justice. Unfortunately, this dis-

trust will not be confined solely to election cases; it will extend to other cases and to all the actions of the judge, and will end by weakening his prestige and destroying his authority.

Weakening of the prestige of the judges, destruction of their authority; such are the consequences of the overthrow of the balance of power brought about by a forced delegation of a political function to the judicial power, for *de jure* the contestation of elections is within the domain of politics.

These consequences are admitted, but the blame is thrown upon political necessity, by reason of the complaints brought against parliamentary decisions, which rendered the recourse to judicial authority necessary.

Politics, whose license even, we are told, has assured our liberties, have, we admit, cruel necessities. To grant their liberties to all the elements of social life, they were compelled to invade all, and in order to bend to their purposes all the powers of the state, they make use of every means. It was perhaps inevitable, but in passing before the courts, might they not have forgotten to enter them? Should they have troubled the majesty of these precincts; tarnished with the breath of suspicion the purity of the ermine, and caused the hand which holds the scales of justice to tremble with the fear of an unjust reproach?

Faith in the courts is sacred to a people, and every institution which tends to lessen this noble sentiment, even were it animated with the praiseworthy desire of preserving the public liberties, can but destroy, in place of saving them, and the law which created it should be struck from its codes.

The system is sought to be justified because it has been borrowed from the English law. A similarity in the political morals of the two countries seems to have been the

reason for this borrowing. But it must not be forgotten that, in this matter, there is behind the political and judicial question, a social question. The constitution of English society, impregnated as it is with its traditional respect for justice and the veneration of the people for its judges, has been able to resist, and, as far as we know, may for a long time resist the shocks of the struggle, engaged in before the Courts, between political and judicial interests.

But the condition of our society is otherwise. Public confidence in judicial institutions is not so protected by old traditions against attacks which might shake it. These strong barriers raised around the tribunals can not so puissantly defend them against the assaults of prejudice and evil passions. In short, our judicial institutions have not the solidity required to support the working of the law,* which the commission proposes to repeal. We have just stated that the good working of this law in England is not a guarantee of its suitability for this province, but is it now certain that the law suits England? It has scarcely been subjected to thirteen years' application * and the future will show if the next fifty years will not reveal the necessity of its repeal, as the six or seven years past have revealed it for us. Once again from a principle, bad in itself, it is difficult to deduce useful consequences.

The best of cures is the prevention of disease, and the system to replace the present one, should be based upon the reform of the election law. This reform, by punishing with more severe penalties, by corporal punishment even, not only the corrupt member elect, but the corrupt elector, by simplifying the forms of election, by introducing the salutary maxim that we have introduced into civil matters, that there is no wrong without its remedy, even without

* The law was passed in England in 1868.

its being pronounced by the law, and by means of other modifications of the same nature, will render more rare the attempt made against the purity of elections, and the cases of nullity based upon subtilities and cavillings, and consequently the contestations of elections, less numerous.

When this result shall have been attained, if the House admits the principle of the withdrawal of the jurisdiction given to the ordinary tribunals, it will be possible to create a special jurisdiction to decide such questions.

This is what we shall see, as we have said, in the title upon Constitutional law. Until then, any modification of the present system would be premature.

CONCLUSION.

We have passed in review in the preceding chapters, the reforms which form the basis of the proposed reorganization of our judicial system. The Commission should here end its report, as so long as the organic principles are not settled, it would be premature to pass to the second part, which consists in the remodelling of the Code of Procedure.

However as there exists, as we have already stated, an intimate connection between the reorganization of the Judicature Acts and the Code, the Commission has prepared by anticipation and in prevision of the adoption of the whole or part of its scheme of reorganization, a sketch of the consolidation of the Code, based on this scheme, to explain and complete it.

A part of this consolidation is published with this report, the rest will be published with the subsequent reports

which the Commission will have the honor of successively laying before the House, with the hope of being able to terminate the whole during the present session.

The next report will also contain a scheme of reorganization for the districts of Gaspé, Saguenay and Chicoutimi, which, owing to their geographical position, it was impossible to divide into circuits as the other rural districts. Being unacquainted with the localities, the Commission was unable to prepare this scheme sooner.

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SECOND PART.

CONSOLIDATION

OF THE

CODE OF CIVIL PROCEDURE.

GENERAL PROVISIONS.

ARTICLE 224.*

The Province of Quebec is divided for judicial purposes into twenty districts, including fifty-nine counties and two cities, of which the table annexed to this draft gives the names and *chefs-lieux*.

ARTICLE 225.

For the purposes of sections 1, 2 and following, of the Act creating the office of Advocate-General, and for those set forth in this Code, the various districts form two jurisdictions, the first, called the jurisdiction of Quebec, composed of the districts of Quebec, Three Rivers, Rimouski, Montmagny, Beauce, Arthabaska, Gaspé, Sague-

* We should commence with a new number for the Articles of this draft Code, but, to avoid confusion in the references, we think it better to continue the series of numbers commenced in the first part of this work.

nay and Chicoutimi, and the second, called the jurisdiction of Montreal, formed of the districts of Montreal, Iberville, Terrebonne, Joliette, Richelieu, St. Francis, St. Hyacinthe, Bedford, Ottawa and Beauharnois.

ARTICLE 226.

For the purposes set forth in the laws of organization and in this Code, these districts, excepting those of Quebec, Montreal, Gaspé, Charlevoix and Saguenay, which will continue to exist as distinct districts, are also divided into five circuits (*arrondissements*) composed of three districts each.

ARTICLE 227.

Saving the common law appeal to the Privy Council, whose statutory jurisdiction is abolished, and the appeal to the Supreme Court, established by federal legislation, civil justice in the Province is exercised in two degrees only; the degree of original jurisdiction (and of sole jurisdiction in the case of Courts of both first and last resort) and the degree of appeal.

ARTICLE 228.

The ordinary civil tribunals are the County Court, the Superior Court and the Court of Queen's Bench, which will be henceforward known under the name of the Court of Appeals, whose powers extend over the whole Province.

ARTICLE 229.

Distinguished from these superior tribunals, ordinary tribunals whose jurisdiction extends, as above stated, over the whole Province, the Commissioners' Court for the summary trial of small cases, more laconically called the

"Commissioners' Court," is an extraordinary or exceptional Court, whose jurisdiction is local and limited to matters of small importance.

ARTICLE 230.

The powers of these various Courts will be found in this Code, in the laws erecting and organizing them, in the public and private common law, and in the statutory legislation of the Province.

ARTICLE 231.

The whole of these powers, in correlation with their duties, constitutes their jurisdiction, and the whole of the rules according to which their jurisdiction is exercised, forms the procedure.

ARTICLE 232.

The jurisdiction is contentious or non-contentious, the competence is general or special, and the procedure is ordinary or extraordinary.

ARTICLE 233.

Contentious jurisdiction is that in which the appearance of the party summoned is compulsory, which requires a judicial examination of the rights and obligations of the parties and which gives rise to a judgment in favor of one of the parties against the other.

ARTICLE 234.

Non-contentious or voluntary jurisdiction is that to which the parties submit voluntarily, which does not give rise to any litigious dispute or examination, does not provoke any condemnation and does not require any preliminary summons.

ARTICLE 235.

Ordinary or plenary procedure is that which requires, to their full extent, the carrying out of the forms and observance of the delays exacted by the law, and extraordinary or summary procedure is that in which the progress of the case is more prompt and rapid, and in which the forms are simplified and the delays shortened. A certain number of summary cases require a still more rapid procedure; this is called the procedure of urgency.

ARTICLE 236.

The judicial year is composed of ten months and ten days, and lasts from the first of September to the tenth day of July in each year, both these days being included.

ARTICLE 237.

The period between these two days constitutes the long vacation.

ARTICLE 238.

As distinguished from this long vacation, the vacation of a court consists in the intervals between the fixed terms of such court.

ARTICLE 239.

With the exception of non-juridical days, upon which the courts cannot sit, and the long vacation during which they can sit only in summary matters, the courts sit permanently and upon every day of the juridical year.

ARTICLE 240.

Every court is clothed with the powers, whether expressed or not, necessary for the exercise of its jurisdiction and to protect it from attempts against the peaceable holding of the courts, and the respect due to judicial authority, to carry out its jurisdiction and insure to the parties the benefit thereof.

ARTICLE 241.

Persons present at sittings of the courts must remain uncovered and in silence, and no one shall disturb good order.

ARTICLE 242.

Every order of the court or of the crier, or of any other judicial official, acting under the authority of the court, for the maintenance of good order during the sitting, must be instantly obeyed.

ARTICLE 243.

Every infringement of the preceding articles is considered as a contempt of court, and is punishable by admonition, reprimand, imprisonment or fine, or by both, pronounced at once by the court against the offender, in its discretion, and according to the gravity and repetition of the offence.

If the transgressor is an officer of the court, he is, besides the above penalties, liable to suspension.

ARTICLE 244.

The suppression of libellous or calumnious writings respecting the courts, public authority, any person

exercising a public office before the Court, or any public or private person or party, produced in any record, may be officially ordered by the courts.

Such writings may also be considered as a contempt of court, and be punishable as set forth in the above Articles, 240 and 243.

ARTICLE 245.

These Articles are not limitative, but apply to all offences of a similar nature.

ARTICLE 246.

The trial and judgment of cases is had in the forms given by the Code. However, in default of prescribed forms and in omitted cases, the courts may, and it is even their duty to dictate to the parties or sanction the forms used by them, which they deem necessary or efficient to validly try cases, give a solid foundation to their judgments and insure their execution.

ARTICLE 247.

The style of procedure is not confined to any technicality or form of words. Every pleading shall be concise, drawn in simple, clear and intelligible terms, distinctly enumerate the grounds and object of the demand, and the written language of the Court shall, in so far as the particular character of the subject permits, be conformable to ordinary language.

ARTICLE 248.

The phraseology of the procedure must be understood according to the rules of construction of ordinary

language and be interpreted in the sense most favorable to the validity of judicial acts, and that most suited to their producing their natural effect.

ARTICLE 249.

Errors of calculation, of drafting, and all faults of caligraphy, when apparent, are corrected by the Courts themselves, in addition to the parties being also allowed to rectify them, on a written or verbal demand to that effect, with or without notice to the other party, in the discretion of the Court, and according as the parties suffer or not by such default of written demand or notice.

ARTICLE 250.

Defects in form involve nullity only when this penalty is formally pronounced by some article of the Code or any other law.

ARTICLE 251.

In every other case, the nullity is within the discretion of the courts, whose judgment upon the matter is not subject to appeal, and it should be pronounced only when the violation of the prescribed form causes to the party invoking such nullity, an irreparable injury. Otherwise, and if the error is not one of those which, according to the last Article, they may of themselves amend, they are forbidden to overlook it; it shall be always lawful to the party who, either personally or by the executive officers whom he has employed, has made a mistake in the form, to amend it and repair such defect in his proceedings.

ARTICLE 252.

Except in cases of absolute nullity, no objection to the form, raised without a substantial grievance by any party, shall be favorably received by the Court.

ARTICLE 253.

In matters within the jurisdiction of the ordinary courts, for which they are severally appointed, all the judges, chief justices and puisné-judges are equal in power, and their jurisdiction extends over all and every part of the Province.

ARTICLE 254.

The judges are, however, distributed in special jurisdictions, within whose limits they perform their ordinary duties. But this assignment of jurisdiction does not take away their competence in the other jurisdictions of the Province.

ARTICLE 255.

Unless a contrary provision, expressed or implied, is contained in the Code or in any other law, every judicial act may be done and signed by a judge, outside the jurisdiction in which the matter to which such act refers is pending, or of the jurisdiction in which such act must be executed, provided such act be done and signed in the Province.

ARTICLE 256.

The sittings of the Courts are public, and no one can be refused entrance thereto. Any person, however, who disturbs the order of the sittings, is guilty of a contempt of Court, and may be expelled therefrom.

ARTICLE 257.

In the discretion of the judges, certain cases, the trial of which would be of a nature to cause scandal and be hurtful to public morality, may, however, be heard with closed doors, the parties, the advocates and the witnesses, with the executive officers of the Court, being alone admitted. A part only of the audience, such as women and children, may be excluded.

ARTICLE 258.

All judicial matters are not necessarily, although they may be validly, dealt with and decided in open Court.

ARTICLE 259.

Every matter not indicated as requiring to be tried and heard in open Court, may be so tried and heard in the judge's chambers, or in cases of necessity, even in his permanent or temporary residence.

ARTICLE 260.

Those matters which must be tried in Court, are called Court proceedings, and the others are called Chamber proceedings.

ARTICLE 261.

By consent of parties, the cases for hearing before the court may, in urgent cases, based on public interest or the private interest of the parties, whose importance the judge shall determine, be in his discretion heard in Chambers, in the residence of the judge, or in any public or private place, provided that the judgment, if not rendered at once, or on the day following the hearing, be rendered

in open court in the ordinary way, and that in the former case it be, without delay, enregistered in the office of the court where the case is pending.

ARTICLE 262.

If, at the opening or at any period of the term, or at any time at which a Court should be held and at which any judicial proceedings should be taken, there is not at the *chef-lieu*, owing to some accident, a suitable court-house in which to hold the sittings of the Court and take such proceedings, such sittings may be lawfully held in any building chosen for that purpose by the judge, upon an order entered in the register.

All writs of summons shall be returned in the place thus temporarily set apart for the holding of the Court, defaults shall be there recorded, and all proceedings taken with the same effect as if in the ordinary court-house.

ARTICLE 263.

In cases in which this Code or any other law has no express provisions applicable to questions of procedure raised before the courts, they shall search among analogous cases for the rules of their decisions.

ARTICLE 264.

In the absence of such analogy, and if a precedent cannot be found, the rules must be sought for in the general spirit of our judicial organization and of our laws of procedure, and in the common law, and in default of all these, they shall be based on common sense.

ARTICLE 265.

Every proceeding is susceptible of amendment at any stage of the proceedings.

ARTICLE 266.

In counting the delays upon summons and all delays of procedure, non-juridical days are not reckoned in commencing or completing such delays, but they are so reckoned in the interval.

ARTICLE 267.

If the day upon which the return of a summons or any other judicial act must be performed, falls upon a non-juridical day, it may be so performed with the same effect upon the nearest following juridical day.

ARTICLE 268.

Neither the day from which the delay is reckoned, nor that upon which it is finished, counts in the interval of time required to render valid a summons or any other judicial act. In these matters, all the delays are composed of clear days

ARTICLE 269.

The words "Tribunal," "Court" or "Judge," applied to the judges in the exercise of their jurisdiction, are synonymous.

ARTICLE 270.

It is within the power of the courts to appoint permanently, for all business, or temporarily for each case, an interpreter to translate into English or French the

depositions and exhibits drawn in either of these two idioms, or in any foreign language. Such interpreter shall be an officer of the Court for the time of the duration of his functions, and must act under oath.

ARTICLE 271.

Outside of and in addition to the cases permitted by law or the rules of practice, every Court has the power to swear persons heard before it or acting under its authority. It also has the same power to require that every act within its jurisdiction shall be performed under the sanction of that solemnity.

ARTICLE 272.

In addition to the judges and commissioners who will be mentioned in Articles 340 and 341, sheriffs, prothonotaries, or clerks of all courts and their deputies, have the power of administering judicial oaths in civil matters.

ARTICLE 273.

No judicial demand can be received by the courts, unless the party against whom it is made has been heard or duly summoned.

ARTICLE 274.

The Court cannot adjudicate beyond the conclusions of the parties, but it may reduce and modify them.

ARTICLE 275.

It is not, however, a violation of the rule laid down in the preceding Article, and an adjudication beyond the conclusions, to pronounce subsidiary condemnations in extension of those demanded, and to order preparatory

and provisional measures, necessary, though not demanded, to insure the execution of the judgment and to render justice to the parties, as will be more amply detailed in the Articles of this Code, which treat of the power given to the parties to produce supplementary conclusions at the hearing upon the merits.

ARTICLE 276.

A party who, by forgetfulness and with no intention of remitting the balance, has claimed less than that which is due to him, may remedy the omission by an incidental demand produced before the judgment in the same suit. The same rule applies to that which has become due since the institution of the suit, by reason of the same cause of action.

ARTICLE 277.

No person can plead in the name of another. The Sovereign alone pleads by attorney and cannot do so otherwise.

ARTICLE 278.

It is not however a violation of this rule to plead by representative, such as minors who plead by means of their tutors, interdicted persons by their curators, and corporations by their administrators.

Except the Sovereign, as above stated, and public bodies who can appear in suits only by attorney, every person may do so in person with the same effect.

ARTICLE 279.

No public officer can be sued for damages, by reason of any act done by him in the performance of his duty, nor can any judgment be rendered against him,

unless notice, in writing, of such suit, specifying the grounds of action and stating the name and residence of the plaintiff's attorney or agent, be served upon him, in the usual manner of serving summons, at least one month before the institution of the suit.

ARTICLE 280.

The transmission of a record, or of part of a record, is made in any way that may be agreed upon between the parties; in default of such agreement, it is transmitted through the post office, the party requiring it paying the postage.

ARTICLE 281.

Any prejudice arising from delays in the transmission, is chargeable to the party who has not paid the postage.

ARTICLE 282.

In the investigation of disputed facts, the judge may, in addition to the proof adduced by the parties, endeavor to arrive at a clear understanding of the matter, by using any means requisite to ascertain the truth.

ARTICLE 283.

He may cite before the court and compel, under the penalties of the law, to appear and testify before him, all persons whom he may think are in a position to enlighten him upon the pretentions of the parties, whatever may be their rank and position, scientists, public officers, or private individuals, provided always that this Article does not affect privileged cases.

The same rule applies to legal incapacity, both with respect to the quality of the witnesses and to their testimony.

If the suit turns upon the verification of writings or special and technical matters, respecting the arts, sciences, professions, trades and industries, the courts may order inspections, operations and valuations to be made by scientific men and those skilled in and cognizant of the matter.

The greatest latitude is given to the courts in this respect, and their judgments are not subject to appeal on these points.

They shall not, however, have recourse to these special methods, except in cases of necessity, and in the ascertained absence of means of discovering the truth and of rendering justice to the parties, by means of regular proof made by them, in the course of ordinary procedure.

ARTICLE 284.

The rules of interpretation of the civil law apply to this Code.

ARTICLE 285.

Article 17 of the Civil Code, and all interpretation laws in force, equally apply to it.

ARTICLE 286.

No person can take upon himself to redress his own grievances, and whoever seeks to obtain a right which is denied him, must sue for it before the Courts.

ARTICLE 287.

In order that a person may be in a position to appear before the Courts, in his own name, and without any outside authorization or intervention, it is necessary (except in the cases hereinafter mentioned, in which minority is not an obstacle to the exercise of this right) that he be of full age, have the use of his reason, and the free exercise of his civil rights and the disposal of his property, and not be under any legal incapacity.

ARTICLE 288.

It is necessary that he should have an interest in the suit. Such interest, except in special cases, where it is otherwise provided, need not be actually existing; it may be only eventual.

ARTICLE 289.

Married women, minors, interdicted persons, and those who are civilly dead, cannot plead or be impleaded, except in the following cases:

A wife, being a public trader, does not require the consent or presence of her husband to take proceedings before the Courts, in connection with her business;

A married woman, separated as to property, or who, not being separated as to property, has by her contract of marriage reserved the enjoyment and management of her property, may, alone and without the assistance and authorization of her husband or of the Court, appear in her own name and formulate all demands, and set up all pleas necessary for its administration and preservation. She takes alone, in her own name, the personal actions belonging to her. Further, a married woman does not

require the authorization of her husband or of the Court to institute, in the case provided for by sections 96 and 97 of the Quebec License Law of 1878, an action of damages against a person licensed for the sale of intoxicating liquor, who, notwithstanding the prohibition made under section 95 of the same law, sells such liquors to her husband.

She may also, without the intervention of her husband or of the Courts, exercise civil recourse, arising from offences committed to her prejudice.

ARTICLE 290.

In all other cases, no married woman can appear in her own name, without being authorized by her husband, present in the case, or by the Court.

ARTICLE 291.

A minor, aged fourteen years, may institute an action to claim as wages or salary, the price of his work or of his services.

ARTICLE 292.

A minor, emancipated by marriage, may appear in his own name and institute all suits and personal actions respecting the administration, preservation and enjoyment of his property.

ARTICLE 293.

The minor, emancipated by law, cannot do so without the assistance of a curator to his property or *ad hoc*, and if it has reference to immovables, he must be assisted by a tutor *ad hoc*.

ARTICLE 294.

An unemancipated minor, being a trader, who, for the purposes of his business, is reputed to be of full age, may institute all real and personal actions relating to such business.

For all suits outside such business, he is considered as an ordinary minor.

ARTICLE 295.

An emancipated minor cannot institute any real action without the assistance of a curator to his property or one appointed *ad hoc*, and without the authority of justice.

ARTICLE 296.

With the exception of the above-mentioned cases, an emancipated minor can no more appear than an unemancipated minor.

ARTICLE 297.

An unemancipated minor cannot appear in his own name. His ordinary tutor or tutor *ad hoc* alone can appear for him and in his name.

ARTICLE 298.

To institute a real action for a minor, the tutor, however, should be duly authorized, upon the advice of a family council.

ARTICLE 299.

A person interdicted for insanity or prodigality cannot appear in his own name. His curator must act for him, in his quality as such.

ARTICLE 300.

A person to whom a judicial adviser has been appointed, cannot act without the assistance of such adviser.

ARTICLE 301.

No real action can be brought by a curator in the name of an interdicted person, or by the interdicted person himself, without the assistance of his curator, and without being previously duly authorized upon the advice of a family council.

ARTICLE 302.

A person civilly dead cannot appear in any suit except to claim necessaries.

ARTICLE 303.

Corporations cannot appear except under their corporate name, recognized by law or usage, or given them by their charter, or the title creating them.

ARTICLE 304.

No suit respecting a substitution or the property composing, it can be received unless a curator appointed to such substitution be party to the suit, in addition to the other persons whose presence therein is necessary.

ARTICLE 305.

There is no right of action against a person who is civilly dead.

ARTICLE 306.

As to the other persons above mentioned who are incapacitated, that is to say: married women, minors, interdicted persons, and corporations, they cannot be summoned before the Courts, except in the forms, qualities and conditions set forth in the above articles, and every omission, if not remedied, shall be a bar to the action which is affected thereby.

ARTICLE 307.

Such bar, however, is not always absolute, and any amendment, made between the institution of the action and the final judgment, if no plea in bar is produced, and up to judgment upon such plea in the second case, has, saving the adjudication left discretionary with the Court as to the costs of the incident, the effect of rendering the suit valid in the following cases:

If a married woman, separated or who, being common as to property, but who has the administration of her property, institutes a real action, or a married woman not common as to property, but who has not the administration of her property, institutes a personal action;

If a minor, emancipated by marriage, institutes a similar real action, or, if being emancipated by law, he institutes a personal action without the assistance of his curator;

If an emancipated minor, assisted by his tutor for real actions, institutes a similar action without judicial authorization;

If a person interdicted for prodigality institutes a personal action without being assisted by his curator;

If a curator to a person interdicted for insanity or prodigality institutes a real action without judicial authority;

If, under similar circumstances, real or personal actions are instituted against such married women, minors, interdicted persons, tutors and curators;

In each of these cases, it is lawful for the husband to intervene in the suit and ratify the actions of his wife, and for the tutor and curator, those of the minor and of the interdicted person, for the past, and to continue them in the future.

In the case of a corporation improperly described, the rectification of the error may be made with the permission of the Court, upon simple notice served upon the opposite party.

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PART FIRST.

PROCEDURE BEFORE THE VARIOUS COURTS.

BOOK FIRST.

SUPERIOR COURT.

ORGANIZATION AND PRELIMINARY PROVISIONS.

ARTICLE 308.

The Superior Court is composed of twenty-seven judges, two chief justices, and twenty-five puisné judges, of whom seven shall reside in the city of Montreal, four in the city of Quebec, and one at the *chef-lieu* of each of the following districts: Rimouski, Kamouraska, Montmagny, Beauce, Saguenay, Arthabaska, Three Rivers, Richelieu, St. Hyacinthe, St. Francis, Bedford, Iberville, Beauharnois, Ottawa, Terrebonne and Joliette, as each shall be assigned by competent authority.

ARTICLE 309.

One of these judges shall be called the chief justice of the Province, and shall reside in one of the two cities of Quebec or Montreal.

ARTICLE 310.

The second shall reside in the other city, and shall be called the chief justice of the district in which he shall reside.

ARTICLE 311.

The chief justice of the Province, in addition to his functions as an ordinary judge, shall continue at the time of the coming into force of this Code, the exercise of his office of chief justice, with all the powers, privileges and prerogatives and duties thereto attached, in the jurisdiction of the Province in which he shall reside, and the second chief justice, in addition to the same ordinary functions, shall exercise the same powers, privileges and prerogatives, and perform the same duties of chief justice in the other jurisdiction. These duties are found in the Judicature Acts and in the Code of Civil Procedure.

ARTICLE 312.

The chief justice of the province shall, however, have precedence over the second chief justice and over all the puisné judges of the Court in the province.

ARTICLE 313.

With the exception of the districts of Quebec, Montreal, Gaspé, Saguenay and Chicoutimi, whose territorial boundaries shall remain the same, the other districts of the province, that is to say: the districts of Rimouski, Kamouraska, Montmagny, Beauce, St. Francis, St. Hyacinthe, Arthabaska, Three Rivers, Richelieu, Bedford, Iberville, Beauharnois, Ottawa, Terrebonne and Joliette, shall be divided into five circuits *(arrondissements)* each formed of three districts, as follows:

1. The first district, composed of Rimouski, Kamouraska and Montmagny, and shall be called the Kamouraska circuit;

2. The second shall be formed of the districts of Beauce, Arthabaska and Three Rivers, and shall be known under the name of the Three Rivers circuit;

3. The third, of the districts of St. Francis, St. Hyacinthe and Richelieu, and shall be called the St. Francis circuit;

4. The fourth, of the districts of Bedford, Iberville and Beauharnois, and shall be called the Iberville circuit;

5. The fifth and last, shall be composed of the districts of Ottawa, Terrebonne and Joliette, and shall be known as the Ottawa circuit.

ARTICLE 314.

Taken collectively, these circuits shall be called the five circuits.

ARTICLE 315.

As above stated, all the judges of the Superior Court shall be of equal jurisdiction and competence, and the jurisdiction and competence of each extends over the whole Province. They, however, exercise their ordinary functions within special district and circuit jurisdictions.

ARTICLE 316.

The judges assigned to the districts of Quebec and Montreal exercise their ordinary jurisdiction only in the districts to which they are assigned.

ARTICLE 317.

The judges assigned to the other districts, that is to say, the fifteen districts grouped into circuits, exercise their ordinary jurisdiction in the districts to which they are assigned, and in the circuit of which the district forms part.

ARTICLE 318.

The Superior Court, a single court for the whole Province, sits in each district, where it is known in the proceedings before it, which should be entitled as of the particular district, as "Superior Court sitting at Montreal," and by inserting the name of the circuit before that of the district, if it is a circuit district, "Superior Court, Kamouraska Circuit, sitting at Montmagny."

ARTICLE 319.

In all the districts, except those of Gaspé, Saguenay and Chicoutimi, which are not subject to this sub-division, the court shall sit in two divisions, the first division and the second division, which name should be added to the heading of the proceedings, "Superior Court, sitting at Quebec—Second Division."

"Superior Court, Three Rivers Circuit, sitting at Arthabaska—First Division."

ARTICLE 320.

The jurisdiction of the Superior Court extends over all matters of a civil and commercial nature in the Province, but in those in which the County Court has jurisdiction, the competence of the first only begins where that of the second ends.

ARTICLE 321

All matters within the jurisdiction of the civil tribunals, may be divided into three classes:

1. Matters in which the recourse is exercised by action under the common law;

2. Those in which it is exercised by writ or proceedings in the nature of a prerogative writ;

3. Those in which the recourse is special and is created by statute.

These three different kinds of recourse and the procedure for their exercise, will be treated in the continuation of this Code.

ARTICLE 322.

With the exception of actions relating to the civil status of persons and those whose institution is accompanied by a writ of *capias ad respondendum*, the County Court has jurisdiction over all common law actions, whose object is appreciable in money and does not exceed the sum of $100.

ARTICLE 323.

The Superior Court has exclusive jurisdiction over actions relating to the civil status of persons, over the other actions, for amounts over $100, and over the two other classes of actions mentioned in article 321, in which the first division of the Superior Court, held by three judges, two of whom shall be a quorum, receives the evidence, sitting the court, and hears the merits of contested cases, and sits in review upon certain judgments of the second division.

ARTICLE 324.

The second division, held by one judge alone, hears the evidence, decides summary matters and those by default, and hears all the incidental proceedings in the trial of contested cases, subject to the review of his judgments by the first division in the cases provided for.

ARTICLE 325.

In actions in which the County Court has jurisdiction up to $100, the Superior Court decides finally from that sum up to $500, and, subject to appeal, above that sum; in questions of state and all matters in the second and third classes of recourse set forth in Article 321, whatever be the amount of the object in litigation.

ARTICLE 326.

In the districts of Montreal and Quebec, the ordinary judges of these districts hold both divisions. In the circuit districts, the three judges residing in these districts hold the first division, and the second is held by the judge of each district.

ARTICLE 327.

For the purposes of the first division, the circuit composed of three districts is under the joint care of the three judges as if it formed only one district, and for the purposes of the second division, each division is under the care of its particular judge.

ARTICLE 328.

In cases in which, owing to the incompetence, absence or sickness, or to any other cause whatever, the district judge cannot hold the second division, the county judge replaces him in holding such division, and in all the duties connected therewith, and he has, for such purposes, the same powers, jurisdiction and authority as the judge of such district.

ARTICLE 329.

In the districts of Quebec and Montreal, as in the circuit districts, if a chief justice forms part of the first division, he presides over it, if not, it is presided over by the senior judge in order of appointment.

ARTICLE 330

If the first division is held by three judges, the decisions are rendered by the majority; if it is held by two judges only, they must be unanimous, and in case the judges disagree, the case is heard *de novo* before these two judges and another ordinary judge, or an assistant judge appointed to give his vote, so that a decision may be rendered.

ARTICLE 331.

The clerk immediately gives notice of this disagreement to the Advocate-General, who confers thereon with the chief justice of the jurisdiction to which the Court belongs, who assigns an ordinary judge, if it can be done without interfering with the duties of the Court to which such judge belongs, if not, an assistant judge, to give the casting decision, and who, on the day fixed, hears the case with the judges who have differed in opinion.

ARTICLE 332.

In the district of Montreal, two sections of the first division shall sit at the same time in different rooms in the Court House, each section being composed of three judges, of whom two shall form a quorum; they shall each have equal powers, and shall have the same functions as a

single division would have, if not so divided. They shall be respectively known as the first and second sections of the first division, and shall sit in the rooms in the court house set aside for them by competent authority.

ARTICLE 333.

In the district of Quebec, the first division shall not be so divided into sections.

ARTICLE 334.

In the two districts, the first division shall sit permanently, and upon every juridical day of the year, if the wants of the judicial service require it, if not, during a sufficient number of days to meet these wants, and which the time of the judges may allow.

ARTICLE 335.

The number and duration of the terms will be fixed in the manner provided by sections 22, 23 and following of the Act for the creation of the office of Advocate-General.

ARTICLE 336.

The judges may shorten or lengthen the duration of the terms, and sit upon days outside those fixed by the table mentioned in the said Articles, but, in the circuit districts, they cannot shorten them before the rolls are exhausted, and so long as there are cases under advisement.

ARTICLE 337.

In the districts of Quebec and Montreal the judges may, in their discretion, suspend or interrupt the terms

during a number of days, or alternate the days for hearing and the days upon which cases are under advisement, so as to enable them to decide during the term, or as shortly as possible after it, the cases that have been heard.

ARTICLE 338.

The second division is held permanently, on every juridical day throughout the juridical year; it may, and even shall be held during the summer vacation for certain cases of summary jurisdiction set forth in the Code.

ARTICLE 339.

Apart from the cases in which, according to this Code, the second division must be held in open court, it may be held with the same effect in the judge's chambers, and even at his residence, if it is impossible for or painful to him to go to the court house.

ARTICLE 340.

The cases within the jurisdiction of the first division must be heard in open court in one of the districts. It is not, however, necessary that they should be heard in the district in which they arose.

ARTICLE 341.

In exceptional cases, and, if necessary in the interest of the parties, they may be heard in the judge's chambers of the district in which they arose, and even in the residence or temporary lodging of one of the judges.

ARTICLE 342.

Any judge may, by commission under the seal of the court, appoint, for the district in which he discharges the duties of his office, as many persons as he pleases, to act as Commissioners to receive affidavits to be used in the Superior Court.

ARTICLE 343.

Each chief justice of the Superior Court and one puisné judge, or two puisnés judges may, by commission under the seal of the court, appoint as many persons as they think necessary, residing in the Province of Ontario, and in any other Province of the Dominion, as Commissioners to take and receive, within the limits of their respective provinces, affidavits to be used in any court of record in the Province.

ARTICLE 344.

The Lieutenant-Governor may likewise, by instrument under the Great Seal of the Province, appoint fit persons residing in any part of the United Kingdom of Great Britain and Ireland, in any of the English Colonies, and in any foreign country, as Commissioners to take and receive similar affidavits.

ARTICLE 345.

Every affidavit so taken and received under the above Articles, 342, 343 and 344, has the same effect, and is entitled to the same credence as if it had been received in open court.

ARTICLE 346.

Upon proof made by affidavit or otherwise, to the satisfaction of a judge, that a party, who has apparently a

good right to exercise in justice, either as plaintiff or defendant, is unable to make the necessary disbursements, such party may be authorized to plead *in forma pauperis*, and the officers of justice are, under such authorization, obliged gratuitously to perform their several duties for such party, to assist him in establishing such right.

ARTICLE 347.

The preceding article does not apply to penal actions. Neither does it apply to those other suits which, however well founded in law, may seem to the judges to be vexatious or animated with a desire to damage the adverse party.

ARTICLE 348.

Such authorization, which upon proof that justice has been deceived, or that the party was, when it was given, in possession of, or has since acquired, sufficient property to allow him to make such disbursements, may be revoked, has not however the effect of preventing the party being condemned to costs in favor of the adverse party, in case he becomes liable thereto.

ARTICLE 349.

It is to the officers of justice, and not to the party pleading *in forma pauperis*, that the adverse party who succumbs as to the costs, shall be condemned to pay the fees for services so performed. And an execution therefor may be issued in their favor.

ARTICLE 350.

Only one execution shall, however, be issued for the joint benefit of all the officers, for the amount due to each, and each will be paid his claim out of the moneys levied under such execution, after such moneys have been deposited in the clerk's office.

ARTICLE 351.

In a suit for personal damages resulting from an offence, if the plaintiff is insolvent and the court believes the suit vexatious, it may compel the plaintiff to give security *judicatum solvi*.

ARTICLE 352.

No person can be condemned unless he has been duly summoned, or has appeared voluntarily.

TITLE FIRST.

OF THE SUIT.

CHAPTER FIRST.

OF THE SUMMONS.

ARTICLE 353.

In personal actions, the summons may be brought:

1. Before the court within whose jurisdiction the defendant, or one of the defendants, is personally served;

2. Before the court of the place of the domicile of the defendant, or one of the defendants;

3. If the defendant has not, or if none of the defendants have a known domicile, before the court of the residence of the defendant, or of one of them;

4. Before the court of the district in which the defendant, or one of the defendants, is served personally;

5. Before the court of the district in which the undertaking which gave rise to the action originated, or before the court of the place in which such undertaking should be executed.

ARTICLE 354.

If the fact or the contract, which gave rise to the obligation, commenced in one district and was completed in another, the obligation shall be deemed to have been for the purposes of the jurisdiction of the court, con-

tracted in each of these two districts, and the Court of each of the two shall be competent to take cognizance of the action.

ARTICLE 355.

If the fact, commenced in one district, was continued in a second, and completed in a third, the obligation shall be deemed to have been, for the purposes of the jurisdiction, contracted in each of these three districts, and so on, and the tribunal of each of these three districts shall be competent to take cognizance thereof.

ARTICLE 356.

If the obligation should be executed in different districts, the principle of the preceding articles is applicable *mutatis mutandis*.

ARTICLE 357.

In the case in which an action claims several debts, it may be instituted before the Court of the district in which any one of these debts was contracted, or before the Court of the district in which it should be executed.

ARTICLE 358.

The above article is applicable to the case in which each of these debts was contracted or should be executed in different districts.

ATRICLE 359.

If a plaintiff, to bring before a strange jurisdiction one or more defendants, invents a right of action against any one to serve him personally or at his domicile, with a

view of bringing the others before the Court of the place of such service or of such domicile, the summons may be set aside for the whole.

ARTICLE 360.

Every action founded upon a conditional obligation or upon an eventual contract, is deemed to have originated at the place where the contract, to which the condition is attached, was made, or at the place where the condition was or was not fulfilled.

ARTICLE 361.

In actions respecting movables, the defendant is served as in personal actions, but if the writ is accompanied by a seizure by garnishment or in revendication of the thing claimed, it is made before the Court in which such seizures were made.

ARTICLE 361*a*.

1. In the case of the usurpation of corporate powers by any body or individuals;

2. Of violation by a public body of the provisions of its charter of incorporation, or commission of acts entailing the forfeiture of such charter or equivalent to a renunciation of such charter, or the usurpation of its franchises or privileges;

3. Of usurpation by an individual of an office, franchise, prerogative or trust in any public body or office;

4. Of the writ of *mandamus*;

5. Of the writ of prohibition;

6. Of the writ of injunction;

7. Of the suit to annul letters-patent by writ of *scire facias*, or recourse under any other form;

8. Of the writ of *Habeas Corpus ad subjiciendum* in civilr mattes;

The defendant may be summoned:

IN THE FIRST CASE.

Before the Court of its principal establishment or place of business, or before the Court of the district in which it is accused of having committed the usurpation, if it is a summons that has brought it before the Court, and before the Court of the domicile or residence, in default of domicile of the defendant or one of them, or before the Court of the district or one of the districts, in which it is alleged the usurpation took place, if such usurpation is charged against one or more individuals.

IN THE SECOND CASE.

Before the court of the district in which the public body has its establishment, seat or place of business, or before the court of the district or of one of the districts in which the party plaintiff claims that the illegal acts and usurpations have been committed.

IN THE THIRD CASE.

Before the Court of the domicile or of the residence, in default of known domicile of the defendant, or of one of the defendants, or before the Court of the place, or of one of the places in which the usurpation shall have been commenced.

IN THE FOURTH, FIFTH, SIXTH AND EIGHTH CASES.

Before the court or courts, within whose territorial jurisdiction the plaintiff demands the execution of the writ of *Mandamus*, Prohibition or *Habeas Corpus*.

IN THE SEVENTH CASE.

As in real and mixed actions, if the letters-patent whose cancelling is demanded, affect immovables, and as in personal actions, if they have not that effect.

ARTICLE 362.

Hypothecary suits against immovables, whose proprietors are unknown or uncertain, and the partition of lands situated in the townships, are taken before the court of the district in which such immovables are situated, and if any immovable in the Province is situated partly in one district and partly in another, the court of either district is competent to take cognizance of the matter, as if the whole was situated in only one district.

ARTICLE 363.

Oppositions to marriage must be brought before the court of the district in which the marriage is to be celebrated.

ARTICLE 364.

If the sole judge administering justice in any district is liable to be recused, or must be a party to the suit, the action may be brought in one of the adjoining districts, the grounds of recusation or disability being alleged in the demand.

ARTICLE 365.

Saving the exceptions hereinafter, real and mixed actions are brought before the court of the defendant, or of one of the defendants, or before the court of the place where the immovable in question in the suit is situated.

ARTICLE 366.

Actions to interrupt prescription, those to obtain delivery of an immovable under a contract, in resiliation or recision of the alienation of an immovable, and to obtain possession or re-entry into possession, are, in the sense of the preceding Article, considered mixed actions.

ARTICLE 367.

The action of boundary is brought before the Court of the place where the property is situated, if one of the parties is domiciled within the jurisdiction, if not, it is subject to the rule laid down in the above Article.

ARTICLE 368.

The action for the dissolution, division or liquidation of a commercial partnership, is brought before the Court of the district of the principal place of the partnership's business or of its office.

ARTICLE 369.

If the firm has several places of business or several offices, before the Court where one of such places of business or offices is situated, or of the Court of the domicile of the defendant or of one of the defendants.

ARTICLE 370.

The action for establishing heirship or for the partition of a succession is brought before the Court of the domicile of the deceased, if at the time of his decease he was domiciled in the province, wherever may be situated the movables or the immovables, whether in this country or in foreign countries.

ARTICLE 371.

If the deceased, at the time of his death, had no domicile in this province, but left real property therein, the action must be brought before the Court of the place where the property is situated, and if he has left property in different districts, before the Court of the place where one is situated, or of the domicile of the defendant or of one of the defendants.

ARTICLE 372.

If the deceased, who had not, at the time of his death, any domicile in the province, but was, however, born there, or had been, at any time, domiciled therein, leaves one or more heirs or legatees and movable property, the action for establishing heirship or for the partition, as the case may be, shall be brought before the Court of the domicile of the defendant, or before the Court of the domicile of one of them.

ARTICLE 373.

The competence of the Courts respecting the action of third parties brought against a succession before partition, is regulated by the Articles 368 and 369 above.

ARTICLE 374.

After the partition, this action, brought by third parties against the heirs, is subject to the ordinary rules of competence respecting other persons.

ARTICLE 375.

The action for separation from bed and board, or of property, is brought before the Court of the place of the actual domicile of the husband in this Province, and if he no longer has a domicile, at the last domicile which he had after the marriage, if the marriage was contracted in the Province of Quebec, or before the Court of the place where he is personally served.

ARTICLE 376.

In all cases in which the situation of an immovable determines the competence of the Court, such situation, partly in one district and partly in another, or the situation of several immovables mentioned in the action in different districts, gives to the Courts of each of these places a concurrent jurisdiction.

ARTICLE 372.

The service of real actions is made as in personal actions, but if the writ is accompanied by a seizure by garnishment, or in revendication of the thing claimed, it is made before the Court of the district in which such seizures were made.

ARTICLE 378.

The defendant must be served either personally or at his domicile, speaking to a reasonable person of his family.

ARTICLE 379.

In commercial matters, the service may, with equal effect, be made at the business office or commercial establishment of the defendant, speaking to a person in his service.

ARTICLE 380.

In civil matters it is only in default of known domicile, that the service may be made at the business office, chambers or commercial establishment of the person summoned, speaking, as above, to a reasonable person in his service.

ARTICLE 381.

The same rules, saving the exceptions hereinafter, apply to each defendant, if there are several.

ARTICLE 382.

In all cases in which a husband and wife, not separated from bed and board, are defendants in the same case, whether the husband is with his wife a defendant in name or in person, or that he is in the case only to authorize her, the service upon the husband in the above form, is sufficient for both consorts. One copy only of the summons equally suffices.

ARTICLE 383.

If they are separated from bed and board, and sued together under any title whatever, two copies of the summons are necessary, and the husband and the wife must be summoned separately, as if they were strangers, and as if the wife had never been under marital control.

ARTICLE 384.

Service upon a general partnership is made at its place of business, if it has one, and if it has not, upon one of the partners, and in such case, in the manner prescribed by Article 387, as if each of such partners had been sued alone and as an individual.

ARTICLE 385.

A similar partnership, if it has an agency or commercial establishment, or seat of business different from its principal establishment or seat of business, and in another district, may, in cases brought in the latter district, be there summoned by speaking to one of the partners personally, or to one of the employees of the firm at such second business office, or at the domicile of one of those partners, speaking to a reasonable person of such domicile.

ARTICLE 386

Service upon a general partnership is made at its commercial establishment or business office, speaking to a person employed in such establishment or office, or there or elsewhere upon its President, Secretary, Trustee, Agent or official, speaking to each personally; or at their domicile or ordinary residence, speaking to a reasonable person of such domicile or residence.

ARTICLE 387.

If the partnership has no known commercial establishment or business office, nor any known President, Secretary, Trustee, Agent or any other official equally known, upon a return by a bailiff to that effect, the second division may order it to be summoned by a notice to be inserted during one month, in at least one newspaper mentioned in the Order allowing such service, as well as the number of insertions, and such method of service is sufficient.

ARTICLE 388.

Service upon a public body or corporation is made in the manner set forth in the general law respecting corporations, by its particular charter, and in the absence of similar provisions, in the manner prescribed in the two preceding Articles.

ARTICLE 389.

Foreign companies or corporations, and the representatives of the succession of any person, not domiciled in this Province and dying in a foreign country, but having property in this Province, may, according to either of the cases of the said preceding Articles, be served in conformity with their provisions.

ARTICLE 390.

Every railway company, home or foreign, traversing this Province in whole or in part, which has neither business offices, President, Secretary or Agent, may be summoned by service of the writ made upon any of its station agents or depot masters in the service of such railway, within the jurisdiction of the Court before which the company is summoned.

ARTICLE 391.

The same rule shall also apply in the case in which such company has a business office or a President, Secretary or Agent in other places of the Province, but has none within the jurisdiction of such Court.

ARTICLE 392.

Service upon the master or captain of a ship, and upon a mariner of any grade and condition, who have no domicile or residence in the Province, may be made on board the ship they belong to, speaking to any person in the ship's employ.

ARTICLE 393.

Persons imprisoned may be summoned by personal service between the wickets.

ARTICLE 394.

If, for the purposes of the execution of the contract upon which the act is founded, the parties or the party defendant alone has elected a domicile in a place other than his real domicile, within the terms of Article 82 of the Civil Code, such place, for the purposes of the service, shall be considered as the real domicile, and Articles 360 and following shall apply *mutatis mutandis*, as if such domicile was the real domicile of the defendant.

ARTICLE 395.

A stranger, amenable to the courts of the Province in the cases provided for by law, is lawfully summoned by the writ served upon him personally, according to the law

of the country where he is served, and in such case, instead of being addressed to a bailiff, the writ is addressed to all persons having a right to make such services in such foreign country. If the person making such service is invested with an official or public character, and if in such country the acts of such party are authentic, the return made by him of such service shall be as authentic as any foreign public document ; if not, the proof required by the law of the country shall be necessary.

ARTICLE 396.

Delays upon summons, counting from the date of the service, shall be one month, if the service is made in any part of the Dominion other than Manitoba, Keewatin, the North-West Territory, or in the United States of America.

ARTICLE 397.

Two months, if it is made in any part of the United Kingdom of Great Britain and Ireland, (including the Isle of Man, and the islands known as the Channel Islands), in Manitoba, Keewatin, North-West Territories, British Columbia and Newfoundland, and of three months in any other country.*

ARTICLE 398.

If the bailift cannot find the defendant, to serve him personally, and he finds the door of his domicile shut, as also that of any other place or establishment where the service might be made, he must apply to one of the neighbors of such domicile or other place or establishment.

* This compilation of delays upon summons in foreign countries is borrowed from the Judicature Acts of the Province of Ontario, so as to have a uniform system in the two provinces.

ARTICLE 399.

He, thereupon, draws up a return of his operations and has it signed by the neighbor so applied to, by his signature or his mark if he cannot write.

ARTICLE 400.

The same bailiff or any other bailiff of the district in which such service should be made, upon the nearest feast of obligation, if the defendant is a Roman Catholic, or upon the following Sunday if he is not, publicly reads the writ and return at the issue of divine service in the morning, at the principal door of the Church, Chapel or other place set apart for religious worship of the religious denomination of the defendant, and affixes thereto a copy of the writ.

A compliance with these several formalities is equivalent to a personal service or a service at the domicile.

The delays upon the summons are reckoned only from the day of the reading and posting at the door of the Church.*

ARTICLE 401.

A defendant, domiciled in the province or in foreign lands, may be summoned by the newspapers in three cases:

1. If he has left the domicile that he had in the Province;

2. If never having had a domicile in the Province, he owns property therein;

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* The provisions of these articles have been made to overcome the fraud of a defendant, who shuts up his domicile to prevent himself from being served.

3 If, never having had a domicile in the Province, or not having property therein, he has become liable to an action, and that in each of these cases he cannot be found within the jurisdiction of the Court, to be there served.

ARTICLE 402.

In any of these cases, upon a return by a bailiff to the effect that, after a diligent search, he has been unable to find the defendant within the jurisdiction, the said return being accompanied by an affidavit of a person, other than the plaintiff, attesting to the facts above set forth, special to each case, it is lawful for the party to notify, by a notice in the language of the defendant, under the signature and seal of the clerk, twice inserted in a newspaper published in the district in which is situated the Court of the defendant's domicile, the second advertisement being inserted eight days after the first, to appear before the Court within one month from the last insertion, and if not, that proceedings will be had against him by default; and if, after the compliance with these formalities, at the expiration of such month, the defendant has not appeared, he is, upon production of the said newspapers in the office of the clerk, proceeded against by default as if he had been regularly summoned.

ARTICLE 403.

The above Article, however, does not apply in the case of the appointment of a curator to the property of an absentee, or the order for the provisional possession of his property, according to chapters 1 and 2 of title 4 of the first Book of the Civil Code.

ARTICLE 404.

A summons cannot, on pain of nullity, be served, either in church or in Court, or upon a member of the Legislature upon the floor of the House.

ARTICLE 405.

A *fabrique* of a parish or religious congregation, not erected into a parish, may be served in the person of the *curé*, or rector, or person, performing his functions in the parish, or of the then acting church-warden.

ARTICLE 406.

Such service may be made upon them either personally or at their domicile, according to the above Articles.

ARTICLE 407.

The summons to appear may be served upon any day in the year, not a Sunday or a holiday, legal and civil holidays and the vacation being included.

ARTICLE 408.

Sundays and holidays are alone excepted, unless with the permission of the judge in cases of urgency.

ARTICLE 409.

Every suit is instituted by writ of summons as heretofore, and the causes of the action are set forth in the writ itself, or in a declaration annexed thereto.

Such declaration, signed by the plaintiff himself or by his attorney (except the Sovereign and corporations, who must sign it through their attorney) must contain a succinct and lucid statement of the grounds and object of the suit.

It must contain the name of the Province, Court, district and circuit, and the name and Christian name, and actual residence of the plaintiff and defendant, and the occupation of the plaintiff.*

ARTICLE 410.

A widow may be summoned under the name of her deceased husband, by adding to the words "widow of" the names and christian names of the said husband. If such widow has had several husbands, such summons must be made under the name of the last.

ARTICLE 411.

In actions upon bills of exchange, promissory notes or other similar commercial paper, it is sufficient to give the initials of the christian or first name of the defendants, such as they are written upon such bills, notes or paper.

The same applies to all other deeds or writings, whether authentic or under private signature, under which a party may be sued under the initials of his christian names, and under the names and christian names which he therein gave to himself.

ARTICLE 412.

When a corporate body is party to a suit, it is sufficient to insert its corporate name, and to indicate its principal place of business, and if it is a commercial firm, it may be summoned under the name of the firm, without its being necessary to mention the names of the partners.

* We will give in an appendix, forms of declaration for all classes of actions.

ARTICLE 413.

If the object of the demand is a thing certain, it should be described in such a manner as clearly to establish its identity.

ARTICLE 414.

If it relates to a corporeal immovable, it is sufficient to describe it by the number upon the cadastral plans and book of reference thereto, of the place where it is situated, if cadastral plans have been made of such place, if not, the nature of such immovable, the city, town, village, parish or township, street, range or concession wherein it is situated, and also the lands conterminous to it should be mentioned.

ARTICLE 415.

If, in the second case, it is a body of land, known under a particular name, it is sufficient to give its name and its situation.

ARTICLE 416.

If the immovable forms part of a township, parish, city, town or village, the lots in which are numbered, it is sufficient to state its number.

ARTICLE 417.

If the demand relates to rents constituted for the redemption of seigniorial rights, or to rights relating to any seigniory, they must be described according to the provisions of the Act 27-28 Vict., chap. 39.

ARTICLE 418.

A party, whose christian names are unknown to the plaintiff, may be sued under the initials of such christian names or of one of them. The same applies to the family name, for which may be substituted the surname under which the defendant is known, but the judgment must, as will be hereafter stated, contain at least one of the christian names and the real family name of the defendant, so as to avoid confusion as to the identity of the defendant, with respect to the effect of the judgment; saving always, however, the case in which the names and christian names are those which the defendants have given to themselves in any writing upon which the suit is based, in which case the insertion in the judgment of such names and christian names, as set forth in the writing, will suffice without any addition.

ARTICLE 419.

The service must be made by a bailiff on the roll within the jurisdiction of the Court within which it is made, whether the summons issued from the Court within whose jurisdiction it is served, or from any other court.

ARTICLE 420.

The service consists in the notification made by the officer effecting the service to the person to whom he speaks, of the demand, the communication of the original of the writ, and the leaving with him of the copy.

ARTICLE 421.

If the person to whom the serving officer speaks requires it, the latter must read it to him.

ARTICLE 421*a*.

The summons is not made for a fixed day mentioned in the writ, but the defendant must be notified to appear within the delay fixed by the following articles.

ARTICLE 422.

Wherever may be the place in the Province in which a summons is served, within the jurisdiction of the Court or in another jurisdiction, and whatever may be the distance of such place from the Court, before which the defendant is summoned, the delay on the summons shall be a uniform one of eight days, without any additional delay, by reason of the distance between the place of service and the Court.

ARTICLE 423.

Within this delay, increased by the delay to plead, which is three days for the production of preliminary exceptions, and six for pleas to the merits, the defendant must appear and plead his preliminary exceptions or to the merits, as the case may be.

ARTICLE 424.

If, within the eleven days after the service of the summons, the defendant has not appeared, or if he has appeared and has not produced a preliminary exception, he is *de pleno jure* deprived of the right to produce it.

ARTICLE 425.

Whether the defendant has or has not appeared and has not produced preliminary exceptions, he has an additional delay of three days, to plead to the merits, and

to appear if he has not already done so. If, at the expiration of fourteen days after the service of the summons, he has not appeared, a default to appear is established against him, and he is proceeded against by default.

ARTICLE 426.

If he has appeared, but has not pleaded, he is likewise deprived of his right to do so, and he is proceeded against *ex parte*.

ARTICLE 428.

Articles 407 and following presuppose that the plaintiff has, during the interval between the service and the expiration of the delay to appear, or on the day itself, returned the summons with the return of the service made by the bailiff.

ARTICLE 429.

If, within the prescribed time, he does not do so, the defendant appearing at any time between the service and the expiration of the delay to plead to the merits, that is to say within fourteen days, may, by returning his copy of the writ, demand, without any formality and without giving notice to the plaintiff, from the second division, a non-suit and the dismissal of the action with costs against the plaintiff.

ARTICLE 430.

The default to produce either the originals or copies of the exhibits mentioned in the declaration, has the effect of suspending, *de pleno jure*, if the defendant wishes to take advantage of the present provision, the delays to

plead to the merits, but not those for filing preliminary exceptions, unless upon special application, and upon the defendant establishing that these exhibits are necessary for him to maintain his preliminary exceptions, the second division otherwise orders.

ARTICLE 431.

The plaintiff, if he is not, as respects the length of the delay, prevented from so doing by some article of this Code, may always cause such suspension to cease by producing the exhibits, but in such case the delay of three or six days to file preliminary exceptions, is reckoned only from such production.

ARTICLE 432.

In the case of preliminary exceptions, the delay of six days to plead to the merits, is reckoned only from the day upon which they are disposed of.

END OF THE SECOND PART.

APPENDIX.

Act regulating the summoning of witnesses, and their depositions before the Courts.

WHEREAS the giving of judicial evidence is a mutual and gratuitous service, which the members of the same civil society should render each other; Whereas the fulfilling of this duty is one of the essential conditions of the administration of justice, and thence in part arises the jurisdiction of the Courts over the litigants of all jurisdictions, to compel them to appear and depose before them;

WHEREAS, seeing the gratuitous nature of such duty, the sole indemnity which a witness may lawfully exact from the party who calls upon him to depose before the Courts, consists in the estimate of the real loss occasioned him by the performance of such duty, that is to say, in the repayment of his travelling expenses and other disbursements occasioned by such testimony, which, under no pretext whatever, should become a source of profit to him;

WHEREAS, according to these principles, the value of the time spent by the witness giving his testimony, cannot be a lawful cause of indemnity, and it is only by a favor based on equity that the tribunals can allow to a poor and needy witness, whose family depends upon his labor for their sustenance, the value of the loss of his time, and further, that such benevolent interpretation should not be allowed to its full extent to the prejudice of a party as poor and as needy, the poor being bound to assist each other as well as the rich;

WHEREAS these incontestable principles are not put into practice by the tribunals, which tax a uniform sum for every day's absence of all witnesses indistinctively, rich or poor, without even having regard to the case in which the witness would have gained nothing if he had not absented himself from home, and without entering into this distinction, which is an abusive practice, and one which should now be remedied;

WHEREAS it is equally necessary to establish a uniform law for the indemnifying of witnesses for their travelling and other necessary expenses, and the manner of recovering this indemnity;

WHEREAS, further, the means of coercion now in force for compelling unwilling witnesses to appear and give evidence before the Courts, are insufficient; the illusory compulsion now in use, is a source of vexation to the parties, and of the tardiness and expense of the proof, and it is expedient to adopt a more expeditious and energetic means of summoning witnesses, and of overcoming and punishing their contumacy or default;

WHEREAS, finally, for all these reasons, a law upon the subject has become necessary;

Therefore, Her Majesty, by and with the advice and consent of the Legislature of Quebec, enacts as follows:

1. There shall be endorsed, either in writing or in print, upon every writ of summons *ad testificandum*, known under the name of subpœna, to be issued after the coming into force of this Code, a copy of this Act, without which such writ shall be of no value.

2. The date of appearance may be left in blank and filled in by the bailiff receiving it.

3. Between the summoning of the witness and the day upon which he should appear, the delay is graduated upon the scale of the following computations:

4. The summons shall be for the next day, if the witness resides in the town, parish, township or other locality in which the Court is held, if made personally, and of one clear day if it has been made by speaking to another person for him.

5. It shall also be one clear day if the witness, who does not reside in the place where the Court is held, resides within a radius of five leagues, and if the summons is served upon him personally, and of two clear days, if it is served by speaking to another person.

6. The same rule applies to the case of a distance of more than five leagues from the domicile of the witness to the Court, with an additional delay of one day for fifteen leagues, any part of fifteen leagues counting for fifteen leagues.

7. In the computation for the previous article, if the distance or a portion of the distance between the domicile of the witness and the Court, may be traversed by railway, each fifteen leagues of such distance shall count only as five ordinary leagues.

8. If the summons to the witness has been served upon him personally, he shall inform the bailiff of the causes which he thinks will prevent him from obeying the summons, of the value of which reasons the Courts are the judges.

9. If poverty or the want of pecuniary means is one of these reasons, and the witness whom the bailiff is allowed to swear, makes oath to the truth of his assertion, the bailiff shall offer, and if he accepts, pay over to him a

sum of money sufficient to meet his travelling expenses, at the rate of ten cents for every actual league of railway, the fiction of Section 8 being only for the computation of the delay to appear, and of twenty cents for every league of ordinary travel, and an additional sum of one dollar for his other expenses.

10. If the witness is not served personally, the bailiff shall leave, with the person to whom he shall give the summons, to hand to the witness, the sum of money mentioned in the preceding section, if such person interrogated under oath, authorized as stated in Section 9, makes oath that, to the best of his knowledge, the witness has not the means of reaching the Court House.

11. He shall also inquire of such person the reasons, if he knows any, which might prevent the witness from obeying the summons, and if such person assigns any, enter his answer in his minute of service, as well as that which he learnt from the witness himself with respect to those hindering reasons.

12. Such minute of service shall contain:

1. The return of the service, to whom, where and when made;

2. The distance by the ordinary road and railway to be travelled from the domicile of the witness to the Court;

3. The offers or payments of money to the witness, or to the person to whom he has spoken;

4. What was told to him by the witness or by such person to whom he spoke, as to the reasons which might prevent the appearance of the witness in compliance with the summons;

5. The mention of the taking of the oath by the witness or the person to whom he spoke.

13. The witness who appears, cannot be exempted from giving his evidence before the payment of his taxation.

14. The Court may, however, in its discretion, adopt the measures necessary to assure to such witness, if needy, the payment of such taxation. It may even order that the witness be not heard before the payment of his taxation.

15. In everything respecting the payment of the witness, the Court will be guided by circumstances, having regard to the pecuniary condition of the parties and witnesses, and shall act in such a manner as to assure to the witness who suffers a serious inconvenience from the delay, the payment of his taxation, and on the other hand, not to deprive the party with limited means, of the evidence of an exacting witness who can, without running into debt, await the end of the case.

16. No execution shall henceforth be issued for the taxation of a witness before the final judgment, and it shall enter into the bill of costs of the case. The witness may, however, notify in writing the party condemned to pay such costs, not to pay his taxation to any one but himself, and such payment made voluntarily, notwithstanding such notification, shall not be valid.

17. The taxation of a witness shall include only the actual expenses, unless the witness be poor and suffer from the loss of his time, in which case the approximate value of his work shall be allowed him. Provided always that in no case more than one dollar per day's absence shall be allowed him.

18. Every witness who, without valid excuse, neglects to appear in Court to there give his evidence, may, in addition to the penalty hereinafter set forth, be sued for the damages occasioned to the party who summoned him, owing to his being deprived of his testimony.

19. If, on the calling of his name on the day for which he was summoned, the witness does not appear, and the minute of service of the bailiff certifies to the carrying out of the formalities and conditions prescribed by Sections 8, 9, 10 and 11, the Court shall, unless for valid reasons set forth in the minute of service, or which the witness, through other persons, shall justify by any other lawful means, order the sheriff or any bailiff specially commissioned to that effect, to cause the witness to appear before the Court upon a day fixed, either for the continuance or the general renewal of the proof, or for the special hearing of such witness.

20. In either case, such renewal of the proof or special hearing shall be fixed within the shortest delay.

21. The methods of moral or physical compulsion to be used by the sheriff or the bailiff appointed, to secure the appearance of the witness, are in their discretion.

Any unnecessary violence committed by the sheriff or bailiff, shall, however, be considered as an act derogatory to the judicial dignity, and must be accounted for to the Court, which, in its discretion, may inform the Advocate-General thereof.

The costs of the sheriff and of the bailiff, incurred in this proceeding, shall be borne by the witness, who shall be bound to their payment by coercive imprisonment.

22. Nothing contained in the preceding Sections shall shield the witness from the punishment of his contumacy, if it constitutes a contempt of Court